CHAPTER 4

STATE PLANNING

This Chapter proposes legislation that establishes various types of state planning agencies, describes their functions, and details different types of state plans and procedures for their adoption and use by state agencies. Some state plans are intended as vehicles simply to formulate policy or create a "vision" for the state. Others have regulatory implications for state and regional agencies and local governments, such as plans for affordable housing. The Chapter includes a model state capital budgeting and capital improvement programming statute, and concludes with a Smart Growth Act based on a 1997 Maryland law.

Chapter Outline

STATE PLANNING AGENCY ORGANIZATION

STATE PLANS

FUNCTIONAL PLANS

4-208.6 Functions and Duties of the Council

[*or*]

Alternative 1B – Council and Regional Planning Agency Work in Tandem

4-208.6 Functions and Duties of the Council and [Regional Planning Agencies]
4-208.7 Appointment of Council Executive Director; Hire by Contracts; Purchases and Leases; Maintenance of Public Records

Alternative 1A – Action by Council

4-208.8 Council Designation of Housing Regions; Determination of Present and Prospective Housing Need; Regional Fair-Share Allocations; Adoption of Need Estimates and Allocations

[*or*]

Alternative 1B-Action by Council and Regional Planning Agency

4-208.8 Council Designation of Housing Regions; Determination of Present and Prospective Housing Need; Preparation of Regional Fair-Share Allocation Plan by [Regional Planning Agency]; Adoption of Plan; Review and Approval of Plan by Council
4-208.9 Contents of a Housing Element
4-208.10 Submission of Housing Element to [Council *or* Regional Planning Agency]
4-208.11 Notice of Submission
4-208.12 Objection to Housing Element; Mediation
4-208.13 [Council *or* Regional Planning Agency] Review and Approval of Housing Element
4-208.14 Adoption of Changes to Development Regulations After Approval
4-208.15 Quasi-Legislative Review
4-208.16 Appeal to Council of Decision Made by a Local Government Regarding an Inclusionary Development When a Housing Element is not Approved or is not Submitted
4-208.17 Review of Decisions of the Council [and Regional Planning Agency]
4-208.18 Enforcement of Housing Element Requirements
4-208.19 Assistance of Court in Enforcing Orders
4-208.20 Council as Advocate
4-208.21 Designation of Authority; Controls on Affordability of Low- and Moderate-Income Housing

CHAPTER 4

SMART GROWTH ACT

Cross References for Sections in Chapter 4

Section No.	Cross-Reference to Section No.
4-101	4-102, 4-104, 4-203, 4-204, 4-204.1, 4-302, 7-402.2
4-102	4-204.1, 4-213, 4-301 et seq., 5-201 et seq., 5-301 et seq., 7-402.2
4-103	
4-104	4-101
4-201	
4-202	4-203, 4-303
4-203	4-101, 4-202, 4-209, 4-201, 4-211, 4-302, 4-303, 4-304, 5-103
4-204	4-209, 4-210, 4-211, 5-104, 5-202, 5-204, 6-201.1
4-204.1	4-209, 4-210, 4-211, 5-201
4-205	4-208, 4-209, 4-210, 4-211, 6-204, 7-205
4-206	4-209, 4-210, 4-211, 7-206
4-206.1	4-209, 4-210, 4-211
4-207	4-208, 4-209, 4-210, 4-211, 6-203, 6-602, 7-207
4-208.1 et seq.	
Alt. 1	4-207, 6-203, 7-207
4-208.6	4-208.8
4-208.8	4-208.6
4-208.9	4-208.22

Section No. Cross-Reference to Section No.

4-208.14	**4-208.16**
4-208.18	**4-208.9**
4-208.19	**4-208.17**
4-208.22	**4-208.9, 4-208.23**
4-208.1 et seq., *Alt. 2*	**4-207, 6-208, 7-207**
4-208.4	**4-208.5**
4-208.5	**4-208.4**
4-208.9	**4-208.3**
4-209	**4-203, 4-204, 4-204.1, 4-205, 4-206, 4-207, 4-210, 4-211, 4-212**
4-210	**4-205, 4-206, 4-207, 5-202**
4-211	**4-205, 4-206, 4-207**
4-212	**4-211**
4-301	**4-302, 4-303, 4-304**
4-302	**4-203, 4-301, 4-303, 4-304**
4-303	**4-203, 4-301, 4-304**
4-304	**4-202, 4-203, 4-301, 4-302, 4-303**
4-401	**6-201, 6-201.1, 7-201, 7-204, 7-204.1**

CHAPTER 4

STATE PLANNING

STATE PLANNING: EARLY YEARS

State planning in the United States has a long history, but one characterized by starts, stops, and attempts at seeking a definition and a role. Early state planning in the twentieth century focused on the creation of state development and conservation departments, whose mission was the management of the states' natural resources. It was not until the Great Depression of the 1930s that state planning received its first strong stimulus from the federal government.

The federal agency that backed state planning was the National Planning Board (NPB), which went under various names during the 1930s. The NPB was first established in 1933 as part of the Federal Public Works Administration, under Interior Department Secretary Harold Ickes. The following year, President Franklin Roosevelt made the board a presidential board by executive order. The NPB underwent a name change in 1935 and became the National Resources Committee (NRC). In 1939, Congress formally created and renamed the board by statute as the National Resources Planning Board (NRPB). The NPRB was formally terminated in 1943, the victim of Congressional hostility and opposition from other federal agencies, most notably the Army Corps of Engineers.[1]

During its existence, the NPB and its successors actively promoted state planning, allotting federal funds to governors who would establish a nonpaid state planning board and a professional to direct its work, sponsor legislation to make the board a continuing agency, and develop a planning program and a long-range public works program for the state. The federal government's support for state planning resulted in an increase in the number of state planning boards from 14 in 1933 to 47 in 1938, with 42 of those having been given a statutory basis.[2] Observed the NRC in a 1938 report:

> It is probably generally accurate to say that in one-third of the States, the planning boards have come to be recognized and accepted as an integral part of the governmental structure. In these States the necessity for such an agency has been generally recognized and the planning notion is permeating the State government as a whole. In another third, the planning boards are in a more precarious position. They are less firmly established and less generally accepted. In another third, planning boards are relatively inactive or nonexistent. In general, the planning boards are not likely to be much better or worse than the administrative and political tradition of the State itself.[3]

The approach of these state planning boards was derived from that used in American city planning and their activities mirrored the type of work carried out by city planning commissions,

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[1]Harold F. Wise, *History of State Planning – An Interpretive Commentary* (Washington: Council of State Planning Agencies, 1977), 10.

[2]National Resources Committee, *The Future of State Planning: A Report to the Advisory Committee by the State Planning Review Group* (Washington, D.C.: U.S. GPO, March 1938), 3.

[3]Id., 3-4.

particularly the collection and analysis of data and inventories. The NRC reported in 1938 that the state boards "have engaged in a bewildering variety of activities," including participation in a national inventory of public works and drainage basin work, a recreation survey, and, in some states, highway planning surveys.[4] Boards were also active in stimulating planning by counties and cities through conferences, promotion of legislation, and technical assistance.

A TEMPORARY DEMISE

The NRPB's demise and the shifting of the nation's attention to World War II also resulted in the phasing out of the state planning boards in most parts of the nation, although continuing state planning activities remained in some states, especially Maryland, Tennessee, Connecticut, and Pennsylvania. The reason for the phase-out was that state planning, as it was constituted in the 1930s and early 40s, "belonged neither to the [g]overnor nor to the legislature, and, as the new boy on the block, in an outgoing and established state bureaucracy, it appeared to be a threat to the established state machinery."[5] In short, it was outside of the political mainstream and had no strong political constituency. Moreover, state planning had no overall doctrine or philosophy to justify its existence. The activities of many of the state boards – inventorying and data collection – were a "catch all or miscellany of jobs [with] no clear or integrative purpose."[6]

RESURGENCE

State planning underwent a resurgence beginning in the late 1950s and continuing into the 1960s and 1970s. The leader of the movement was Hawaii. While still a territory, Hawaii in 1958 enacted legislation establishing a state planning office under the governor and then published a general plan for the state in 1961. Its efforts led to state-level zoning that divided the state into watershed and conservation areas, agricultural lands, and land for urbanization. California prepared a state development plan in 1962 using state funds and federal planning assistance monies. Under an office of regional development in Governor Nelson A. Rockefeller's office, the State of New York, also influenced by the Hawaii initiative, produced a state development policy report in 1964, under the

[4]Id., 9. For other reports discussing state planning activities in the 1930s and 40s, see, e.g., National Resources Board, *State Planning: Review of Activities and Progress* (Washington, D.C.: U.S. GPO, June 1935); American Society of Planning Officials, *Newsletter* I, no. 11 (December 1935) (special issue on state planning); National Resources Committee, *State Planning: Programs and Accomplishments* (Washington, D.C.: U.S. GPO, December 1936); and National Resources Planning Board, *State Planning* (Washington, D.C.: U.S. GPO, June 1942).

[5]Wise, *History of State Planning,* 12.

[6]Id., 12, 13. See also Leopold A. Goldschmidt, *Principles and Problems of State Planning*, Planning Advisory Service Report No. 247 (Chicago: American Society of Planning Officials, June 1969).

title *Change/Challenge/Response*.[7] In 1971, the New York office of planning coordination released Phase I of the *New York State Development Plan*. The plan:

> contained a series of regional maps detailing projected settlement and land use patterns, urging that they not be used as regional plans, but rather that they provide objectives or guidelines for the development of plans by existing regional planning groups. In further support of region-wide planning, the document recommended that counties be authorized to adopt regulations dividing the county into development districts (e.g., urban, agricultural, recreation, conservation), and to prescribe development intensity and population density within each district. At the same time the Development Plan was touting regionalized planning efforts, it also called for broader local control and the authorization of flexible and innovative zoning techniques for cities, towns, and villages.[8]

The *New York State Development Plan* was a remarkably sophisticated and detailed document and one well ahead of its time. However, the plan produced a great deal of controversy, apparently over its lack of citizen outreach and involvement in its preparation. Ultimately, the office of planning coordination underwent a name change and its authority was limited to technical assistance, not functional planning.[9]

Other states, prompted by the availability of federal planning monies, began to create their own new planning organizations. By 1968, new state planning legislation had been adopted by Arizona, Colorado, Florida, Georgia, Kansas, Louisiana, Michigan, Minnesota, Nebraska, New Mexico, Oregon, Texas, Washington, and Wisconsin.[10]

The passage of the federal Intergovernmental Cooperation Act of 1968[11] greatly enhanced state planning. Title IV of the act was implemented through Office of Management and Budget Circular A-95 and gave states and regional planning organizations the ability to review and comment on applications for federal funds and their relationship to state and regional plans, goals, and policies.[12]

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[7]Wise, 14-15. See also Patricia E. Salkin, "Regional Planning in New York State: A State Rich in National Models, Yet Weak in Overall Statewide Planning Coordination," *Pace L. Rev.* 13, no. 2 (Fall 1993): 512-513 (discussion of New York State development policy report).

[8]Salkin "Regional Planning in New York State": 513, citing State of New York, Office of Planning Coordination, *New York State Development Plan – I* (Albany, N.Y.: January 1971), 8, 44, 50, and 88.

[9]Id., 516.

[10]Id., 18.

[11]82 Stat. 1103.

[12]Frank S. So, Irving Hand, and Bruce D. McDowell, eds., *The Practice of State and Regional Planning* (Washington, D.C.: International City Management Association, 1986), 75. The A-95 review process has since been modified by the federal government. The A-95 Circular has been replaced by a Presidential Executive Order, No. 12372, of July 14, 1982, *Federal Register* 47, no. 137, July 15, 1982.

Beginning in the late 1960s and continuing into the 1990s, a number of states initiated growth management programs.[13] These programs were characterized by the development of state goals and, in a number of cases, the preparation of a plan map that showed land uses, environmentally sensitive or critical areas, or areas expected to urbanize. (Recent efforts by these states are described in Table 4-4 and discussed below.) Massachusetts, Connecticut, and Rhode Island created housing appeals boards to which local decisions regarding proposals for affordable housing could be appealed.[14]

NEW DIRECTIONS: STRATEGIC PLANNING AND BUDGETING

In the 1970s and 80s, many state planning offices and departments began to be involved in doing research for the governor and cabinet officers, preparing budgets, and developing legislative agendas. This trend was born out by a 1992 report based on a survey and analysis of centralized planning efforts in 37 states conducted by the Virginia Commission on Population Growth and Development. The report noted that eight states:

> appear to have created a new planning entity to assist with the formation or creation of the state's long-range, strategic planning effort. For example, Arkansas created a new commission to devise its plan. Both New Jersey and Rhode Island formed two new entities concurrent with the enactment of their strategic planning statutes. Vermont transferred planning authority back to the office of the governor [from a "central planning office"] when it enacted Act 250.[15]

According to the Virginia commission report, six states– Kentucky, Massachusetts, New Mexico, Pennsylvania, West Virginia, and Wisconsin – answered that they did not engage in centralized planning at the state level. In these states, planning was accomplished by cabinet

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[13]See generally Fred Bosselman and David Callies, *The Quiet Revolution in Land-Use Control* (Washington, D.C.: U.S. GPO, 1971); John M. DeGrove, *Land, Growth, and Politics* (Chicago, IL: APA Planners Press, 1984); and John M. DeGrove with Deborah A. Miness, *The New Frontier for Land Policy: Planning and Growth Management in the States* (Cambridge, Mass.: Lincoln Institute for Land Policy, 1992).

[14]Mass. Ann. Laws, Ch. 40B, §§20-23 (1993 & Supp. 1994); Conn. Gen. Stat. Ann.§80-30g (1989 & Supp. 1994); and R.I. Gen. Laws §§45-53-1 to -7 (1991 & Supp. 1994).

[15]Marc Bernstein, "Survey of Centralized Planning Efforts of State Governments," in *Growth Management and Strategic Planning: A Background Reader* (Richmond, Va: Commission on Population Growth and Development, July 1994), 2. The states are Arkansas, Florida, Hawaii, Maryland, New Jersey, Oregon, Rhode Island, and Vermont. Arkansas' Commission for Arkansas' Future was created in 1989 to develop the state's comprehensive plan. Ark. Code Ann. §25-25-101 (Supp. 1993). New Jersey established its Office of State Planning and its State Planning Commission when it enacted its State Planning Act of 1985. N.J.S.A. §52:18A-201 (1995 Supp.). The Office of State Planning exists within the Department of Treasury and the director serves at the pleasure of the governor. The office assists the State Planning Commission in creating and revising the State Development and Redevelopment Plan. Rhode Island's statewide planning program includes the State Planning Council, the Office of Strategy Planning, and the Office of Systems Planning. R.I. Gen. Laws §42-11-10(b)(2) (1993). The Office of Strategic Planning and the Office of Systems Planning are both housed in the Division of Planning, which is located in the Department of Administration.

departments and executive branch agencies in their fields of expertise.[16] Four other states responded that they did not maintain an office dedicated to centralized planning.[17] The remaining 19 states, noted the Virginia report, "fell somewhere between these two extremes. These states engage to some degree in centralized coordination, but do not have a major planning entity dedicated solely to this purpose."[18] In addition, the study determined that at least five states that engaged in long-range strategic planning – California, Minnesota, Texas, Rhode Island, and Washington – linked their planning efforts to some degree with the budget process.[19] This new direction documented by the Virginia study confirms the a partial shift away from the natural resource- and physically-oriented city planning heritage of state planning and a move toward policy analysis and strategic planning.

TWO STATE PLANNING MODELS

Two general approaches in state planning have emerged and pose useful paradigms for drafting legislation (see Table 4-1). One has been called the *"civic model"* and is derived from the heritage and assumptions of city planning. The second has been termed the *"management model"* and draws its orientation and techniques from the science of organization management. Under the civic model, the state would engage in a goal-setting process, develop an inventory of resources and an appraisal of existing conditions that affect the ability to achieve those goals, identify a set of alternative actions, and compile a list of implementing measures. The civic model would produce plans affecting land use and critical areas management or addressing functional topics like transportation, water, and economic development. The plans would have regulatory impact and/or affect the programming of infrastructure to support particular growth strategies.

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[16]Bernstein, "Survey of Centralized Planning Efforts," 2.

[17]Id. The states are Alaska, Delaware, North Dakota, and South Carolina. Delaware does, however, have a Cabinet Committee on State Planning. Del. Stat. Ann. Tit. 29 §9101 (1994).

[18]Id.

[19]Id. According to the Virginia report, California's Office of Planning and Research assists the Department of Finance in the budgeting process. Cal. Gov't. Code §§65037, 65038 (1992). Minnesota maintains an independent cabinet level strategic planning agency, the Office of Strategic Long-Range Planning. The office coordinates with the commissioner of finance, affected agencies, and the legislature in the planning and financing of major public projects. Minn. Stat. §4A.01 (Supp. 1993). Under the Texas strategic planning legislation, planning authority is lodged in two agencies, the Governor's Office of Budget and Planning and the Legislative Budget Board. The Governor's Office, housed within the executive branch, has responsibility for developing the initial draft of *Texas Tomorrow*, "a statement of the vision, philosophy, mission, and goals" for the state. H. 2009, 72d Leg. §3 (1991). The Legislative Budget Office, a ten-member board within the legislative branch comprised solely of members of the legislature, monitors and analyzes performance indicators supplied by the planning process. Rhode Island, discussed above, requires "close coordination" between strategic planning and budgeting. Washington's Office of Financial Management is responsible for state planning and program development, including budgeting. Wash. Rev. Code Ann. §§43.41.030 to 43.41.980 (1994).

Table 4-1: Elements of the Civic and Management Models of State Planning

Characteristics	Civic Model	Management Model
Purpose	To identify public goals and large-scale policy choices that will shape the future of the state consistent with those goals	To ensure that state agencies operate in an efficient and coordinated manner consistent with the priorities of the chief executive
Implementing agent	State government	State government
Source of power	The people, through consensus	The governor, operating under the constitution
Source of goals	The people, directly through various techniques	The people, indirectly through the electoral process
Organizational status of planning	Various, not inherently sited within government	Adjacent to or part of the office of the governor
Administrative role of planning	Strictly advisory	Advise and control
Relationship to legislative branch	Varies - may be very close or quite distant	Limited by the separation of powers tradition
Time horizon	Typically long-range, though not inherently limited to long-range issues	Typically short range, though not inherently limited to short-range issues
Typical products	"State comprehensive plan;" "state land use plan;" "state goals;" and "futures programs"	"Planning systems;" "planning and budgeting systems;" "policy directives;" and "coordination mechanisms"
Advantages	Permits citizen participation, encourages long-range thought, and frees planning from immediate political concerns	Likely to be directly relevant to current decisions
Disadvantages	May be ignored by policy makers and may lack political legitimacy	Tied to the management style of governors and may be short-range, narrowly focused, and sometimes partisan.

SOURCE: Lynn Muchmore, *Concepts of State Planning, State Planning Series 2* (Washington, D.C.: Council of State Planning Agencies, 1977), 14.

While the purpose of the civic model is to identify public goals and large-scale policy choices that will shape the state's future, the purpose of the management model is to ensure that state

agencies operate in an efficient and coordinated manner consistent with the priorities of the chief executive. Under the management model, the governor, who is the state's chief executive, implements policies and measures enacted by the state legislature and uses the planning system to exert administrative control over state agencies by establishing operational guidelines and directions for them.[20]

Note that the civic model is more likely to be used for plans that have a physical dimension to them, such as land use. State-supervised land-use planning has been a central concern in many states, as noted above. Five main approaches to state land-use planning programs have been identified, exclusive of those that simply enable planning by local government.

State planning – the state plans and zones land, develops and maintains a statewide land-use plan, and implements the plan through permits and regulations (Hawaii is the only state that comes closest to this model).

State-mandated planning – the state sets mandatory standards, some of which apply to regional agencies and local governments, for those aspects of land use planning and control that involve state interests (e.g., Oregon, Florida).

State-promoted planning – the state sets guidelines for those aspects of planning that involve state interests, establishing incentives for local governments to meet the guidelines (e.g., Georgia).

State review (the"mini-NEPA system") – the state requires environmental impact reports for certain types of development, thus superimposing a second tier of review on the traditional local planning model. The state agency reviews the reports for conformance with state standards. (e.g., California, Washington).

State permitting – the state requires permits for certain types of development, thus preempting local review and permitting for those types of development. (e.g., Vermont).[21]

The management model would be more likely to employ a *strategic planning approach* through which a state agency or agencies would develop strategic plans that would cut across state agency

[20]Lynn Muchmore, *Concepts of State Planning* (Washington, D.C.: Council of State Planning Agencies, 1977), 6, 10-11.

[21]Mitch Rohse, "Recommendations for the Role and Structure of State Planning Agencies," in *Modernizing State Planning Statutes: The Growing Smart℠ Working Papers, Vol. 1*, Planning Advisory Service Report 462/463 (Chicago: American Planning Association, March 1996), 79-84.

functions and activities. Legislation to accomplish this was proposed by the Virginia Commission on Population Growth and Development but was never enacted.[22]

Economic development and transportation plans assume this strategic dimension when they focus less on establishing policies and guidelines for the location of new and rehabilitated facilities and more on the overall objectives and direction of programs and the operational capabilities of state agencies to carry them out.

The state's planning agency should be an *independent* agency rather than an office or division within a larger agency.[23] This independence calls for long-term funding, authority to coordinate state agency programs, and interagency linkages.

Table 4-2: Types of State Planning Agencies

Type of Agency	*Appropriate Use*
State planning office	Governor wants agency to undertake policy research, state policy planning, and interagency coordination
State planning department	Routine administrative duties such as land-use permitting and regional and local plan certification, as well as duties described for state planning office
State planning commission	Independent body to develop plans, develop broad-based support for planning, advise governor, state agencies, legislature
Cabinet co-ordinating committee	Policy coordination among state department heads and coordinate planning
Department of development	Provide economic development focus and technical assistance to local governments. Planning function may be subordinated to economic development priorities.
Department of environment	Natural resources or environmental protection focus (not recommended as a location of state planning activities)

The state planning agency will need strong linkages to other state agencies that deal with *both* natural resources and development. But locating the agency within a broader natural resources department poses some significant problems. To do so "may hinder the agency's efforts to deal with vital development issues such as affordable housing or public facility planning."[24] Similarly, a state planning agency should not be placed within an economic development department because of the potential conflict between economic development and resource protection issues.[25]

[22]State of Virginia, HB 1068, 2-5-94, "Virginia Growth Strategies Act."

[23]Rohse, "Recommendations for the Role and Structure of State Planning Agencies," 84.

[24]Id.

[25]Id.

The model statutes that follow describe five different types of state planning agencies, their functions, powers, and duties, and the type of plans they may prepare. The statutes are also linked to model legislation contained elsewhere in the *Legislative Guidebook*.

It should be emphasized that while state planning systems are usually created by legislation, they do not necessarily mature and come into their own as mechanisms of government overnight. As the commentary above noted, state planning has ebbed and flowed for decades in the U.S. The more highly developed state-backed programs, such as Oregon and Florida, have had the benefit of 10 to 20 years of experience. Moreover, effectiveness of such organizations requires commitment from the governor and the state legislature, even-handed internal management, adequate staffing and other resources, and a willingness to adjust the system as the political, economic, and social environment changes. At its best, as in Oregon, state-mandated, but locally-administered land-use planning results in widely held values about what is important to the citizens of the state. Consensus on and commitment to such goals only occur over the long term. The model legislation below is a framework that may enable such a process to occur. Regardless of what approach and agency the state uses, however, it is important for a state to set goals for itself and to follow up on those goals to see whether they are being implemented.

STATE PLANNING AGENCY ORGANIZATION

Commentary: Types of State Planning Agencies

The alternative types of state planning agencies include the following (see Table 4-2 above):

1. A *state planning office* in the office of the governor, one whose primary activity would be to advise the governor on policy initiatives and coordinate activities of various state agencies. For example, California has an Office of Policy Development and Research, and Maryland has an Office of State Planning.

2. A *line department* whose function is planning. The department, responsible to the governor or to a state planning commission, would also be chiefly responsible for the preparation of certain state plans, as described in the statute and would assist other state departments that have responsibility for functional plans, such as a state department of transportation. If the legislation so provides, the department would carry out a variety of routine activities (it is this line function that distinguishes it from a planning office), such as the issuance of permits, the review of local plans, and the maintenance of geographic information systems.

3. A *state planning commission*. The concept of a state planning commission, an appointed body responsible for all state planning, dates back to the 1930s, as a response to the federally

established National Planning Board which urged governors to create and staff such boards.[26] The early planning boards, in states like Maryland and Pennsylvania, focused on rural and resource-related problems, reflecting state planning's conservation lineage.[27] A number of states still have state planning commissions. Maryland, for example, recast its state planning commission in 1992 as the "Economic Growth, Resource Protection, and Planning Commission," and gave the commission a number of responsibilities, including the preparation of an annual report to the governor and general assembly on the achievement of state planning goals.[28] New Jersey's State Planning Commission is responsible for overseeing the preparation of the state development and redevelopment plan.[29] Oregon's Land Conservation and Development Commission oversees the state-mandated local land use planning program, adopts statewide planning goals, and reviews local comprehensive plans for compliance with those goals.[30] Where a state does not have a strong tradition of statewide planning and requires an independent body to initiate and gain support for a new program, a state planning commission is a helpful mechanism. Moreover, because the commission will continue through different administrations, it can establish a presence and continuity for planning in the state.

4. The *cabinet coordinating committee* pulls together key departments whose activities have an impact on planning and land use, enabling a governor to speak with a single voice on critical growth and development issues in the state. A secondary purpose of the committee is to resolve

[26]Wise, *History of State Planning,* 11.

[27]Model legislation drafted in 1935 by Attorneys Edward Bassett and Frank B. Williams proposed a state planning commission. The Bassett/Williams model consisted of a commission of five members. One member was to be the head of the highway department, another was to be head of the state park department, and the remaining three were to be citizen members appointed by the governor. The commission was required to prepare a state master plan and official map and advise governing bodies and planning commissions of counties and municipalities in "accomplishing a coordinated, adjusted and harmonious development of the state." Edward M. Bassett, Frank B. Williams, Alfred Bettman, and Robert Whitten, *Model Laws for Planning Cities, Counties, and States Including Zoning, Subdivision Regulation, and Protection of the Official Map* (Cambridge: Harvard University Press, 1935), 54. Attorney Alfred Bettman proposed a similar model, except that the six-member commission membership included heads of the state departments of highways, public works, health, and agriculture, a member of the faculty of the state university (selected by the governor from a list submitted by the university's president), and one other member to be appointed by the governor. The commission's job was to prepare and adopt a state master plan; to advise and cooperate with municipal, county, regional, and other local planning commissions within the state; and to furnish advice to any state department or officer on any matter relating to state planning. The commission was authorized to prepare and submit to the governor or state legislature drafts of legislation for carrying out the master plan or any part thereof. Id., 110-119.

[28]Md. Code Ann., State Finance and Procurement, §§5-701 to 5-708 (1995). See also Pa. Stat. Ann. §§1049.2 to 1049.3 (1995) (establishment and powers and duties of state planning board).

[29]N.J.S.A. §52:18A-196 *et seq*. (1995 Supp).

[30]Ore. Rev. Stat. §197.303 *et seq*., esp. §197.040 (1994).

disputes among state departments on the siting of state and regional public facilities. Under the Delaware state planning act,[31] the governor has created such a council, composed of departments of transportation, agriculture, economic development, budget, natural resources, and environmental control into a cabinet committee on state planning issues.

5. A *department of development*. Some states have departments of development that may also go under the name of department of community affairs or department of commerce.[32] One typical activity of such departments is encouraging economic development through loans and grants, tourism promotion, technical assistance, and aid to firms seeking to locate in the state. Typically, a *division of planning* is located in a department that may have some of the planning functions (e.g., technical assistance, education, data collection and analysis). However, such departments often subordinate planning considerations to those of economic development; if the agency head is drawn from the economic development field, then the department may have an economic development outlook. This is a factor that should be carefully weighed in deciding where to place the planning function in state government.

6. A *department of the environment.* Under this type of agency, the planning function would be a division within a larger department that has environmental or natural resources focus. An example from Britain is the English Department of the Environment (DoE), which combines housing, land-use regulation, and environmental control.[33]

There is no model legislation proposed in this Chapter to establish a department of environment with a planning function within it. The practice of creating environmental "superdepartments" that

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[31]Del. Code Ann, Tit. 29, §9101 (Cabinet Committee on State Planning Issues) (1995).

[32]See, e.g., the Illinois Department of Commerce and Community Affairs whose planning authority is described in, 20 ILCS §605/46.7 (Official state planning agency – acceptance and use of federal funds) and 20 ILCS §605/46.39 (1993) (Planning – funds – cooperative efforts); Ohio Department of Development whose planning authority is described in Ohio Rev. Code §122.06 (1994) (Planning duties).

[33]H.W. Davies, "England," in *Planning Control in Western Europe* (London, England: Her Majesty's Stationary Office, 1989), 36. The function of the DoE in the context of mandatory planning has been discussed as follows:

> If a state chose to exert a high level of oversight [of local government compliance with state policies related to mandatory planning], the state agency's responsibilities would follow those of the DoE: issue regulation; provide guidance; call-in applications [for review of development proposals that would otherwise be the responsibility of local government and that substantially depart from a local plan, or have national consequences, such as power plants]; consider appeals; and approve comprehensive plans and zoning ordinances.

Jay Hicks, "Lessons from the British for State Statutory Reform," in *Modernizing State Planning Statutes: The Growing Smart℠ Working Papers, Vol. 1*, Planning Advisory Service Report No. 463/463 (Chicago: American Planning Association, March 1996), 69.

combine environmental protection and natural resource management – a regulatory and service provision focus – has been criticized in the planning literature because of the conflicting internal goals of such agencies and the swings in the policy preferences of the department heads.[34]

The legislative models that follow do not describe the internal organizational structure of the state planning agency. If a state legislature wants a certain area to have a specific institutional emphasis, it can enact a statute that creates divisions within the state planning agency. For example, if the state legislature wanted to ensure that a function of the state planning agency would be to assist the public in obtaining permits from state and local agencies, it could create (as California has done) an office of permit assistance.[35] Similarly, if the legislature decided to emphasize education and training, it could create a special division or even set up an institute for that purpose.[36]

The legislative model establishing a planning division (Section 4-101, Alternative 5) has been drafted to be inserted into a statute establishing a development department. It refers to other statutory sections, which would have to be modified to reflect the division's functions and duties, including planning responsibility. No attempt has been made to describe the functioning of a department of development (which, as noted above, may go by different names).

Note: The term "state planning agency" is shown in brackets. The actual name of the agency should be substituted (e.g., the state planning office).

[34]E.H. Haskell and V.S. Price, *State Environmental Management: Case Studies of Nine States* (New York: Praeger, 1973), 252-255. The authors also provide two case studies describing early planning reform efforts in Vermont and Maine.

[35]See Cal. Gov't. Code, §65040.9 and §§65922.3 to 65922.5 (1994) for a description of an Office of Permit Assistance and its duties. This office is located within the Office of Planning and Research.

[36]For a description of an independent planning and research institute, with a possible affiliation with a state university, see American Law Institute (ALI), *A Model Land Development Code* (Philadelphia, Pa.: ALI, 1976), §§8-601 to 8-602. The institute is not given the power to prepare comprehensive plans – as that would conflict with the function of the state planning agency – but can conduct long-range research, issue reports, and conduct educational seminars and other programs. Id., §8-602.

4-101 [State Planning Agency] (Five Alternatives)

Alternative 1 – State Planning Office

(1) There is established an office of state planning within the office of the governor. The office of state planning shall be under the direct control of the director of the state planning office, who shall be appointed by and serve at the pleasure of the governor. [The director shall have at least a combination of [6] years of undergraduate or graduate education in planning and professional planning experience.]

(2) The director of the state planning office shall perform all functions and duties as identified in Section [4-102], exercise all powers, assume and discharge all responsibilities, and carry out and achieve all purposes vested by law in the office, including contracting for professional or consultant services in connection with the office.

(3) The director of the office of state planning is authorized to organize the office into such divisions and units as will best carry out the functions and duties of the office.

Alternative 2 – State Planning Department

(1) There is established a state planning department.

(2) The head of the state planning department shall be the director of the state planning department. The director shall be appointed by and serve at the pleasure of the [governor *or* the state planning commission]. [The director shall have at least a combination of [6] years of undergraduate or graduate education in planning and professional planning experience.]

♦ For the state planning office, the state planning department, and the planning division, the model legislation provides optional language establishing a minimum combination of six years of undergraduate or graduate education in planning and professional experience in planning for the director or deputy director. This experience and education requirement is similar to that required to become a member of the American Institute of Certified Planners, the professional testing and credentialing affiliate within the American Planning Association. While such qualifications may not always be necessary, they may become important when the director is expected to have both a high degree of administrative skill and technical knowledge.

(3) The following units within the department of state planning are established: [*List divisions within the department*].

(4) The director shall appoint the division heads, who shall serve at the director's pleasure.

(5) The director shall have the following duties:

(a) be the administrative head of the department;

(b) oversee the activities of the department in its functions and duties as identified in Section [4-102];

(c) appoint, reappoint, assign, or reassign all subordinate officers and employees of the department, prescribe their duties, and fix their compensation subject to the [*cite to state personnel relations law*];

(d) represent the state before any agency of the State or the United States with respect to any matter in connection with the functions and duties of the department as identified in Section [4-102]; and

(e) provide clerical and support services for [advisory committees *and/or* the state planning commission].

Alternative 3 – State Planning Commission; Creation; Powers

♦ The State Planning Commission may be created along with a state planning office, department, cabinet coordinating committee, or a planning division within a development department.

(1) There is established [in the [state planning agency] *or* in the office of the governor] a state planning commission to consist of [15] members to be appointed as follows:

(a) [5] directors of [the following] state departments: [*list specific departments to be represented*]. A director serving on the commission shall not be represented by an official designee. All state department directors, or designees, shall be entitled to receive notice of and attend meetings of the commission and, upon request, receive all official documents of the commission;

(b) [4] persons [, not more than [2] of whom shall be members of the same political party,] who shall represent [county and municipal] governments, to be appointed by the governor [with the advice and consent of the senate[37]] for terms of [4] years and until their respective successors are appointed and qualified, except that the first [4] appointments shall be for terms of [1, 2, 3, and 4] years, respectively. [In making these appointments, the governor shall give consideration to recommendations of the state association of counties, the state municipal league, the state association of planners or planning officials, the state association of regional planning agencies, etc.]

(c) [6] public members [, not more than [3] of whom shall be of the same political party,] to be appointed by the governor [with the advice and consent of the senate] for terms of [4] years and until their respective successors are appointed and

[37]This assumes that the state legislature is bicameral. Where there is only one house, substitute the legislature's title for "senate."

qualified, except that for the first [6] appointments, [1] shall be for a term of [1] year, [1] for a term of [2] years, [2] for a term of [3] years, and [2] for a term of [4] years.

(2) The governor shall appoint a successor before the expiration of the term of a commissioner who is a representative of county and municipal government or a public member. No commissioner who is a representative of county or municipal government or a public member shall serve more than [2] full terms as a member of the commission. If there is a vacancy for any cause, the governor shall make an appointment that shall become effective immediately for the unexpired term.

(3) The commission shall meet for the purpose of organization as soon as practicable after the appointment of its members. The governor shall select a chair, who shall serve at the pleasure of the governor, from among the public members [*Alternate:* The commission shall annually select a chair from among the public members], and the members of the commission shall annually select a vice-chair from among the representatives of the public, or the county or municipal representatives. [Eight] members of the commission shall constitute a quorum, and no matter requiring action by the full commission shall be undertaken except upon the affirmative vote of not less than [8] members. The commission shall meet at the call of its chair or upon the written request of at least [8] members. All meetings of the commission shall be open to the public [*or* All meetings of the commission shall comply with the state open meetings law as provided in Section [*cite to state public meetings statute*]. Members of the commission are entitled to compensation as provided in [*cite to applicable state statute*].

(4) The commission shall:

(a) prepare and adopt within [36] months after the enactment of this Act, and review every [2] years, and propose amendments to, as necessary, the [state comprehensive plan, state development plan, state biodiversity conservation plan, *and other state plans*], pursuant to Sections [4-203], [4-204], and [4-204.1];

(b) develop and promote procedures to facilitate cooperation and coordination among state, regional and local agencies with regard to the development and implementation of plans, programs, and policies that affect land use, infrastructure, environmental, housing, capital improvement programming, natural hazard mitigation, and economic development issues;

(c) prepare a biennial report pursuant to Section [4-104];

(d) ensure widespread citizen involvement in all phases of its work;

♦ The following functions are optional.

[(e) review and approve regional and local comprehensive plans pursuant to Section [7-402.2]];

[(f) review, at the request of the governor, the proposed state capital budget and capital improvement program developed pursuant to Section [4-302(1)]];

[(g) assist in the development and preparation of model planning ordinances to guide state and regional agencies, counties, municipalities, and special districts in implementing the state comprehensive plan, state land development plan, and state biodiversity conservation plan;

[(h) prepare statewide planning guidelines;]

[(i) review and recommend to the [director of the state planning agency] the designation of areas of critical state concern pursuant to Section [6-201 *et seq.*;] and

[(j) sponsor, in conjunction with the [state planning agency], education and training programs in planning and related topics for employees of state, regional, and local agencies and for elected and appointed officials.]

Alternative 4 – Cabinet Coordinating Committee

(1) A Cabinet Coordinating Committee on State Planning is established and shall serve in an advisory capacity to the governor. The committee shall be composed of the following members, none of whom shall be represented by an official designee:[38]

(a) [the director of the department of transportation];

(b) [the director of the department of agriculture];

(c) [the director of the [department of development *or equivalent agency*]];

(d) [the director of the department [of administration *or* finance]];

(e) [the director of the department of the environment];

(f) [the director of the department of emergency services]; and

(g) such other members as the governor may designate.

[38]The list of state department directors is for illustrative purposes only since departments may have different titles in each state. In some states, for example, the director of the department of emergency services is a division head in a larger department, such as the department of the environment.

(2) The governor shall designate one member to serve as chair of the committee.

(3) The committee shall consider and periodically report to the governor on matters related to the orderly growth, development, and redevelopment of the state and the means of coordination among state departments to achieve those ends. These matters shall include, but shall not be limited to:

(a) the management and prudent use of the state's resources, including land, water, air, forest, historic, and scenic resources, wildlife, and energy;

(b) the efficient and productive utilization of water resources, including watershed management, maintenance of water quality;

(c) the reduction or elimination of long-term risk to people and property from natural hazards;

(d) the location and balanced utilization of and need for airport, highway, public transportation, and bicycle facilities;

(e) the location and need for sewage, wastewater treatment, solid waste disposal, and electrical generating facilities;

(f) the development and location of commerce and industry;

(g) the location of and need for state office buildings, colleges and universities, health, welfare, and correctional institutions, and other state facilities;

(h) the development and location of housing, and the availability of such housing for low- and moderate-income households;

(i) the preservation and efficient utilization of prime agricultural lands;

(j) the preservation of historic and scenic resources; and

(k) mechanisms of cooperation between and among state agencies, and among federal agencies, state agencies, regional agencies, and local governments.

(4) The committee shall meet at least [6] times during each calendar year.

(5) On [*date*] of each year, the committee shall prepare and submit to the governor an annual report of its activities, together with the recommendations for legislative and/or administrative changes it deems desirable. The governor shall review the annual report, and upon approving it, shall transmit the report to the legislature and shall make the report available to the public. Copies shall be deposited in the state library and shall be sent to all public libraries in the state that serve as depositories for state documents.

(6) The governor [may *or* shall] appoint a planning coordinator who shall supervise the committee professional and clerical staff. The coordinator shall serve at the pleasure of the governor. The staff shall work in cooperation with all federal, state, regional, and local agencies of government, as well as with private organizations and individuals, to obtain all necessary and relevant information for its assignments. In addition to the committee staff, the committee shall be assisted by staff designated by each participating department or agency.

Alternative 5 – Planning Division within Department of Development

(1) There is established within the [department of development] a division of planning. The division of planning shall be under the supervision of the [deputy director of development for planning], who shall be appointed by and serve at the pleasure of the director of development, and who shall coordinate the activities of the division with other activities within the department. [The [deputy director] shall have at a combination of [6] years of undergraduate or graduate education in planning and professional planning experience.]

(2) The division shall perform all functions and duties as set forth in Section [4-102].

(3) The [deputy director of development for planning] is authorized to organize the division of planning into such units as will best carry out the functions and duties of the division.

Commentary: Functions and Duties of the State Planning Agency

In establishing or reconstituting a state planning agency, it is extremely important to evaluate the agency's functions and duties and their relation to the agency's position in state government. Where the agency is located within the state administrative structure and what its duties are have often been the keys to its success. The list of functions of a state planning agency that follows has been intentionally drafted to be broad and inclusive and to have linkages with other sections of the model legislation. In some states, these functions might be spread out over several agencies. For example, geographic information systems might be in one agency and coordination with the U.S. Census Bureau in another.

4-102 Functions and Duties of the [State Planning Agency]

The [state planning agency] shall have the following functions and duties:

(1) Planning. The [state planning agency] shall:

(a) prepare plans for the state pursuant to Sections [4-203, 4-204, 4-204.1, and 4-207 *as applicable*];

(b) coordinate the plans and programs of all departments, divisions, bureaus, and agencies of state government;

(c) harmonize its planning activities with the planning activities of regional agencies and local governments;

(d) provide technical assistance in planning to regional agencies and local governments;

(e) cooperate with and assist units of the federal government in the execution of their planning functions in order to harmonize their planning activities with the plans for the state;

(f) conduct, as necessary, special studies and undertake research; and

(g) participate in national, interstate, and regional planning programs.

(2) Administration, education, and training. The [state planning agency] shall:

(a) administer federal and state grant-in-aid programs assigned to the [state planning agency] by statute or executive order;

(b) coordinate state programs with the federal government;

(c) engage in a program of public information and communication regarding its activities;

(d) establish and maintain a statewide program to ensure widespread public participation in state-supported planning programs;

(e) provide staff support [and representation on behalf of the governor] to the following commissions and boards pursuant to Sections [*cite to applicable Section nos.*]: [*List commissions and boards*];

(f) contract with, as necessary, private or nonprofit organizations for assistance in consensus-building in connection with any activity undertaken by the [state planning agency];

(g) publish annually a compilation of all state laws and administrative rules related to planning;

(h) provide education and training programs in planning and related topics to employees of state, regional, and local agencies and to elected and appointed officials; and

(i) perform such other duties, regardless of function, as the governor may assign.

(3) Information gathering and forecasting. The [state planning agency] shall:

(a) gather, tabulate, analyze, and periodically publish information and reports on the location and pace of development throughout the state, including, but not limited to population, housing, economic, and building permit data;

(b) serve as the state clearinghouse agency responsible for coordinating data collection and data dissemination among the state, regional and other public agencies, local governments, and the private sector;

(c) develop and maintain a computerized geographic information system in support of state, regional, and local planning and management activities;

(d) cooperate with the Bureau of Census and other federal agencies to improve access to the statistical products, data, and information available from the federal government;

(e) annually estimate the resident population for the state and local governments;

(f) prepare, at least twice in each decade, a [20]-year population forecast in [5]-year intervals for the state and local governments; and

(g) promulgate standard procedures for the establishment of accurate, large-scale base mapping to support local government administrative functions, such as tax assessment, public facility management, and engineering.

(4) Implementation. The [state planning agency] shall:

(a) review and approve regional and local comprehensive plans pursuant to Section [7-402.2];

(b) prepare the state capital budget and state capital improvement program pursuant to Section [4-301 *et seq*.];

(c) administer the areas of critical state concern program pursuant to Section [5-201 *et seq*.];

(d) administer the development of regional impact program pursuant to Section [5-301 *et seq*.];

(e) establish, by administrative rule, a process by which any individual or organization may obtain an opinion from the [state planning agency] clarifying the application of any goal, policy, or guideline in the state plans, except that the [agency] shall not issue an opinion regarding any petition that seeks either to validate or invalidate a specific code, ordinance, administrative rule, regulation, or other instrument of plan implementation;[39] and

(f) initiate programs of dispute resolution.

Commentary: Rule-Making Authority

A state planning agency is usually given the authority to promulgate rules and issue orders by statute. The rule-making process often follows a state administrative procedures act that applies to all state agencies.[40] In the absence of a statute establishing a state rule-making process, the process may need to be incorporated into the legislation.

One special aspect of administrative rule making in connection with planning is the need to give advisory information that interprets rules. For example, if a state planning agency is authorized to review and certify local plans for compliance with minimum statutory standards, it will issue rules to explicate what the statutes mean.[41] The agency may also publish guidelines to local governments in the form of sample plan chapters or checklists. However, these guidelines will not have the same force and effect of rules; they will merely indicate different types of alternatives that a local government may wish to pursue and will leave open other options that meet the intent of the rules.[42]

The following section is adapted in part from the American Law Institute's *A Model Land Development Code*.[43]

[39]This provision is based on N.J.A.C. §§17.32-6.1 to 17.32-6.5, which authorizes the New Jersey State Planning Commission to issue "letters of clarification" interpreting the State Development and Redevelopment Plan.

[40]See, e.g., Uniform Law Commissioners' Model State Administrative Procedures Act (1981) in *Uniform Laws Ann.* 15 (St. Paul: West, 1990).

[41]Wash. Admin. Code, Ch. 365-1993, (Procedural Criteria for Adopting Comprehensive Plans and Development Regulations) (1993); Ga. Admin. Code, Chapter 110-3-2 (Minimum Standards and Procedures for Local Comprehensive Planning) (1992).

[42]See, e.g, Washington State Department of Community Development, Growth Management Division, *Small Communities Guide to Comprehensive Planning: A Model Comprehensive Plan* (Olympia, Wash.: The Department, June 1993); _____, *State Review of Local Growth Management Comprehensive Plans* (Olympia, Wash.: The Department, March 17, 1993).

[43]American Law Institute, *A Model Land Development Code* §8-201.

4-103 Authority to Adopt Rules, Issue Orders, and Promulgate Guidelines

(1) The [state planning agency] shall have the authority to adopt rules and issue orders concerning any matter within its jurisdiction.

(2) Rules or orders of the [state planning agency], other than rules concerning its internal organization and affairs, shall be adopted or issued in accordance with the procedures of the [*state administrative procedures act*] for the adoption of rules or regulations or issuance of orders after a hearing.

(3) All rules adopted by the [state planning agency] shall be published in the [*name of administrative code or other document*].

(4) The [state planning agency] shall have the authority to prepare and distribute guidelines in the form of sample ordinances, sample regulations, technical reports, and related advisory information for use by regional agencies, local governments, and other interested parties. These guidelines may provide alternative examples that could meet the intent of rules adopted under this Section, but shall not constitute rules themselves.

(5) The [state planning agency] shall not adopt guidelines in lieu of a rule.

Commentary: Biennial Report

The following Section mandates that the state planning agency prepare a biennial report assessing statewide trends, issues, and opportunities. The report could also be used as a vehicle to establish quantitative and qualitative benchmarks or evaluation criteria. In addition, the report could also document measures of progress against those benchmarks. The establishment of a unified statewide geographic information system will help states gather information to gauge the impact of state policies. This information will be helpful in monitoring how well new systems are working and in determining whether there should be midcourse corrections. A biennial, rather than an annual, report is recommended to minimize the administrative burden on the state agency in its preparation.

4-104 Biennial Report

(1) By [*date*] of each even-numbered year, the director of the [state planning agency] shall prepare a biennial report to the governor. The report shall: analyze demographic, economic, social, and environmental trends affecting the state; discuss the state's progress in achieving goals and policies in adopted state plans; describe activities carried out by the [agency] during the previous [2] years; describe activities carried out by regional agencies and local governments in the state pursuant to this Act during the previous [2] years; recommend proposed changes in state policies and legislation to carry out state, regional, and local plans prepared under this Act; and provide any other analysis, recommendations, and information that the director deems relevant.

(2) Every officer, agency, department, or instrumentality of state government, of regional agencies, and of local government shall comply with any request made by the director for advice, assistance, information, or other material in the preparation of this report.

(3) The director shall send the biennial report in draft form to the governor. The governor shall review the report, and upon approving it, shall transmit the report to the members of the legislature, state agencies, departments, boards and commissions, appropriate federal agencies, and to the chief executive officer of every local government in the state, and shall make the report available to the public. Copies shall be deposited in the state library and shall be sent to all public libraries in the state that serve as depositories for state documents.

STATE PLANS

State plans fall into at least the following categories (see Table 4-3):

(1) **Strategic futures plan**. These state plans are intended to articulate a "strategic vision" for the state, to identify problems, trends, and opportunities facing the state, and to describe new strategies and programs for achieving that vision. In 1992, Minnesota published such a document, *Minnesota Milestones*, which contains a "shared vision" for the state as well as a statewide report card of social, economic, and environmental indicators.[44] In 1995, its Environmental Quality Board followed up with *Challenges for a Sustainable Minnesota: A Minnesota Strategic Plan for*

Table 4-3: Typical State Plans and Their Purposes

Type of Plan	*Purpose*	*Pros*	*Cons*
Strategic futures plan	Provides "vision" of state's potential destiny, ideas for initiatives	May provide catalyst for statutory change	Commitment to change depends on legislative and gubernatorial commitment
State agency strategic plans of operation	Sharpens agency focus, relationship to client groups	Requires agencies to monitor output, performance	State agencies may resist accountability measures
State comprehensive plan	Integrates goals and policies to coordinate and direct state agency activities	Compels state to engage in broad-brush goal-setting	Goals and policies may be bland, "pie-in-sky"
State land development plan	Establishes goals, policies, and guidelines for lands and types of development having a state interest	State clearly identifies state interests in land development	Local governments may resist state encroachment on their authority
State biodiversity conservation plan	Establishes goals, policies, and guidelines for the protection of living natural resources in a consistent and coherent manner	State clearly identifies state interest in the maintenance of healthy biological system	Plan's goals and policies may be perceived as regulations

[44]Minnesota Planning, *Minnesota Milestones: A Report Card for the Future* (St. Paul, Minn.: Minnesota Planning, December 1992).

Sustainable Development, a document intended to move the state "toward development that improves people's lives over the long term while sustaining the natural resources future generations will need."[45] The plan identified a series of sustainable development initiatives for the state.

Such plans may be developed by a "state goals" or "futures" commission and will have no binding impact on state operations, although new legislation may be a consequence of recommendations contained in the plans. If a state is initiating state-level planning for the first time, or resuming it after a hiatus, this approach is probably the most appropriate. Several states, including Hawaii and Arkansas, have legislation authorizing a commission to undertake such planning.[46]

(2) **Strategic plans of operation**. These state plans are intended to guide the operation of state agencies, much in the same sense as private-sector strategic planning. Such plans would have statewide applicability, but only for the activities of a particular agency, although the agency would be required to conform its mission to applicable statewide goals and policies contained in other plans. Texas, Florida, and Georgia, for example, have such legislation.[47]

(3) **State comprehensive plans**. These plans provide goals, policies, and objectives for state and other agencies, such as regional agencies and local governments. Such plans are intended to coordinate policy among all levels of government in such areas as economic development, land use, transportation, health, education, public safety, water resources, and intergovernmental relations. Here, the purpose is to infuse plans of other governmental levels with policies that are consistent with those the state desires, presumably to be reflected in their implementation. The plans can be used, for example, to direct state capital budgeting and location decisions. A state planning agency may also evaluate the plans of state and regional agencies and local governments against the goals, objectives, and policies, provided they are sufficiently detailed, and certify them for compliance.

An example of such a plan is the Florida *State Comprehensive Plan*. This plan was initially adopted in 1985 as part of the major reorganization of Florida's growth management system. The plan consists of a broad range of state goals and implementation policies. It was adopted by the state legislature and appears as Chapter 187 of the Florida Statutes. The plan:

[45]Minnesota Environmental Quality Board, *Challenges for a Sustainable Minnesota: A Minnesota Strategic Plan for Sustainable Development* (St. Paul, Minn.: The Board, July 1995 Draft), 5.

[46]See, e.g., Ark. Code Ann., Ch. 25 (1993 Supp) (Commission for Arkansas' Future); Hi. Rev. Stat. Ann., Ch. 22 (1995 Supp) (Commission on the Year 2000).

[47]Texas Gov't. Code, Ch. 2056 (1995 Supp) (Strategic plans of operation); Fla. Stat. Ann. §§186.021 to 186.022 (1995 Supp) (State agency strategic plans); and Ga. Code Ann. §40-2903 (1995 Supp) (Strategic plans).

> is intended to be a direction-setting document. Its policies may be implemented only to the extent that financial resources are provided pursuant to legislative appropriation or grants or appropriations of any other public or private entities.[48]

A subset of the *State Comprehensive Plan* is the *State Land Development Plan* prepared by the Florida Department of Community Affairs.[49] A form of functional plan, it was intended to build upon and detail related land development goals and policies found in the *State Comprehensive Plan*. The *Land Development Plan*, which was adopted in 1986 and again in 1989 and which was undergoing revision in 1995, has two purposes:

(1) State agencies are to consider the State Land Development Plan as they prepare their own strategic plans;

(2) The state's regional planning councils must consider the land development plan in preparing their own "strategic regional policy plans." However, in Florida, these regional plans need not be consistent with the state land development plan but must be consistent with the state comprehensive plan.[50]

In Rhode Island, the Division of State Planning of the Rhode Island Department of Administration has prepared a *State Guide Plan* under the direction of the State Planning Council to provide a foundation for reviewing other plans and proposals for consistency. The *State Guide Plan* is "mandated by law as a means for centralizing and integrating long-range goals, policies, and plans with short-range project plans and with implementation programs prepared on a decentralized basis by the agency or agencies responsible in each functional area."[51] The *State Guide Plan* is used by the Division of Planning to review local plans for consistency with growth management acts. It is not a single document but rather a collection of elements that have been adopted since the 1960s. The plan consists simply of a series of goals, policies, issues to be addressed, and strategies for a variety of functional elements; the *State Guide Plan Overview* provides a summary of the adopted elements under a single cover.

In Maryland, the Planning Act of 1992 requires all local governments to implement through their comprehensive plans a series of seven "visions" – the State's "Economic Growth, Resource

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[48]Fla. Stat. Ann. §187.101(2) (1991). The *State Comprehensive Plan* appears in the Florida statutes rather than as a separate published document.

[49]See Fla. Stat. Ann. §§380.031(17), 186.021, and 186.022 (1991 and 1995 Supp.).

[50]Florida Department of Community Affairs, *1995 Florida Land Plan: The State Land Development Plan, Revised Public Workshop Draft* (Tallahassee, Fla.: The Department, June 1995), 2.

[51]Division of Planning, Rhode Island Department of Administration, *State Guide Plan Overview, Report No. 80* (Providence, R.I.: The Division, October 1992), v.

Protection, and Planning Policy" – set forth in the Act.[52] It also lists a number of required local plan elements (statement of goals and principles, a land-use element, a community facilities element, a sensitive areas element, and a variety of others).

Some state plans include topics covered in a state comprehensive plan, but also contain a plan map, as a graphic representation of the plan's policies. The plan map may indicate the extent of urbanization of different parts of the state, sensitive areas that the state may wish to protect (e.g., wetlands, archeological and historic sites, prime farmland, and estuaries), and a hierarchy of urban centers. The most thorough multi-faceted state plan with a plan map has been prepared by the New Jersey State Planning Commission, the *New Jersey State Development and Redevelopment Plan.* It is to be used to guide municipal and county master planning, state agency functional planning, and infrastructure investment decisions. The plan is a *policy guide* and is not intended to be used to formulate codes, ordinances, administrative rules or other regulations. The general plan strategy is to "achieve all state planning goals by coordinating public and private actions to guide future growth into compact forms of development and redevelopment, located to make the most efficient use of infrastructure systems and to support the maintenance of capacities in other systems."[53] The plan's contents, especially the plan map, were subjected to a three-stage negotiated, nonbinding "cross-acceptance" process among the commission, county planning commissions, and local governments in which areas expected to urbanize or develop in a certain fashion were identified as "centers" and surrounding "planning areas."[54]

Connecticut has adopted a state-level *Conservation and Development Policies Plan* which also contains a plan map. The plan, which is authorized by state legislation,[55] was prepared by the state's Office of Policy and Management (OPM) and was subsequently approved by the legislature. The plan map divides the state into three classes of urban areas, three classes of areas of environmental concern, and two classes of rural areas, with policies applying to each of them. State agencies in Connecticut are required to consider the plan when they undertake agency plans. In addition,

[52]Md.Code Ann., Art. 66B, §3.06 (Purpose of plan; visions), and Art., State Finance and Procurement, §5-7A-01 (Statement of policy) (1995).

[53]New Jersey State Planning Commission, *Communities of Place: The New Jersey State Development and Redevelopment Plan* (Trenton: The Commission, June 12, 1992), 3. Authority for cross acceptance appears in N.J.S.A.§§52:18A-202 to 202.1 (1995 Supp.) The cross-acceptance rules appear in N.J.A.C. §§17:32, Subchapters 3, 4, and 5. For a discussion of the adoption of the New Jersey Plan, see Peter A. Buchsbaum, "The New Jersey Experience," in Peter A. Buchsbaum and Larry J. Smith, eds., *State and Regional Comprehensive Planning: Implementing New Methods for Growth Management* (Chicago: American Bar Association Section of Urban, State, and Local Government Law, 1993), 176-190; John Epling, "The New Jersey State Planning Process: An Experiment in Intergovernmental Negotiations," in Jay M. Stein, ed., *Growth Management: The Planning Challenge of the 1990's* (Newbury Park, Cal.: Sage, 1993), 96-112.

[54]New Jersey State Planning Commission, *Communities of Place*, i-ii, 4-6.

[55]Conn. Gen. Stat. Ann., Ch. 297, Part I (1995).

agency-prepared plans, when required by state or federal law, are submitted to the OPM in order to be reviewed for plan conformity.[56]

If the cost for a state or federally funded project exceeds $100,000, state agencies must demonstrate consistency with the plan when acquiring, developing, or improving real property, when public transportation facilities or improvements or facilities are acquired, or when any state grant is authorized for those purposes. In addition, the Secretary of the OPM annually submits to the State Bond Commission, prior to the allocation of bond funds for any of those actions, an advisory statement commenting on the extent to which such action conforms with the plan.[57]

Of the different types of state plans, a plan containing a map is the most difficult to achieve on a centralized basis, particularly in a large, urbanized state, because of the amount of information that must be collected, the many actors involved, the individualized determinations on the delineation of the plan's policies to specific areas, and the perception that the plan is the equivalent of statewide zoning.[58] This type of area-specific planning may be more appropriately or practically undertaken at the regional or local level. Still, the existence of a plan map does give a statewide perspective showing, for example, how plans affecting various regions or that affect certain functions, like transportation, fit together.

STATE PLANS

Commentary: State Futures Commission and State Strategic Futures Plan

The following legislative model describes a state futures commission charged with preparing a state strategic futures plan. In contrast to the state planning commission described above, the futures commission has a somewhat broader composition, involving members of the legislature as well as lay citizens. While such a commission could prepare its report and go out of existence, it may be more effective as an ongoing instrument of state government. The futures plan is a vehicle for

[56]Id., §16a-31 (Application of plan).

[57]State of Connecticut, Office of Policy and Management (OPM), *Conservation and Development Policies Plan for Connecticut, 1992-1997* (Hartford, Conn.: OPM, 1992), 2.

[58]For a discussion of the fate of such a plan in Vermont and the perception that it would result in statewide zoning, see John DeGrove with Deborah Miness, *The New Frontier for Land Policy: Planning and Growth Management in the States* (Cambridge, Mass.: Lincoln Institute of Land Policy, 1992), 68; see also Richard M. Brooks, "State and Regional Land Use Planning and Controls," in Patrick J. Rohan, *Zoning and Land Use Controls*. 5, §33.03[3][a] (New York: Matthew Bender, 1989 Supp); and Phyllis Meyers, *So Goes Vermont: An account of the development, passage, and implementation of state land-use legislation in Vermont* (Washington, D.C.: The Conservation Foundation, February 1974), 28-33.

obtaining statewide consensus on where the state should be heading and what actions should be taken to bridge the gap between the reality of the present and the potential of the future. It may result in proposals to revamp state planning laws or to study the issue of planning statute reform more thoroughly (see Chapter 1 of the *Legislative Guidebook*). The model legislation imposes few procedural requirements on the commission other than to complete a plan and involve the state's citizens in so doing. It is adapted from the Arkansas and Hawaii statutes.[59]

4-201 State Futures Commission; Strategic Futures Plan

(1) There is established a state futures commission. The commission shall be composed of:

(a) the speaker of the house of representatives;

(b) [4] members of the house of representatives, appointed by the speaker of the house, with no more than [2] members from the same political party;

(c) the president pro tempore of the senate;

(d) [4] members of the senate, appointed by the president pro tempore of the senate, with no more than [2] members from the same political party; and

(e) [5] residents of the state appointed by the governor, except that no resident appointed by the governor shall be a member of the state legislature.

(2) All nonlegislative appointees shall serve [4] year terms unless they resign or are unable to serve or fail to attend [2] consecutive meetings of the full commission, without providing the chair with a written excuse in advance. When a vacancy occurs on the commission, the chair shall notify the appropriate appointing authority, and the vacancy shall be filled in the same manner as the original appointment. Persons appointed to fill vacancies shall serve the remainder of the unexpired term and shall be eligible for reappointment for one [4] year term. In the event that the vacancy arises as a result of a member missing [2] consecutive meetings, the chair shall also notify that member.

(3) The commission shall elect a chair and a vice chair from its nonlegislative members to serve for [2] years.

[59] Ark. Code Ann., Ch. 25 (1993 Supp) (Commission for Arkansas' Future); Haw. Rev. Stat. Ann., Ch. 22 (1995 Supp) (Commission on the Year 2000).

(4) The commission shall also elect one of its nonlegislative members to serve [2] years with the chair and vice chair as an executive committee.

(5) The commission shall meet at least [twice] each year.

(6) The commission shall, at the recommendation of the executive committee, appoint an executive director. The executive director shall work under the direction and control of the commission. Other members of the staff shall be appointed by and work under the direction of the executive director.

(7) The state futures commission shall prepare a state strategic futures plan. The plan's purpose shall be to articulate a vision of the potentials for the state and its citizens and to identify means for achieving those potentials.

(8) In preparing the state strategic futures plan, the commission shall seek the participation of the citizens of the state and shall hold workshops and/or public hearings, and may utilize other appropriate means to involve the citizenry.

(9) The state strategic futures plan shall contain:

(a) a discussion of economic, demographic, sociological, educational, technological, and related trends affecting the state in urban, suburban, and rural areas;

(b) a discussion of the state's relevant economic, natural, historical, cultural and scenic resources, environmental, transportation, geographic, technological, and related strengths and weaknesses that distinguish the state from other states;

[(c) a discussion of the state's vulnerability to natural hazards and the associated risks to life, property, and state, regional, and local economies;]

(d) a discussion of views and comments from citizens that result from the citizen participation process;

(e) a statement describing a vision for the state and specific goals related to that vision;

(f) detailed strategies and initiatives that will assist the state in achieving that vision, including changes in existing governmental programs and legislation, new governmental programs and legislation, and actions that may be taken by both the private and not-for-profit sectors. The strategies and initiatives may be accompanied by a schedule for implementation; and

(g) a system of measurement to identify the extent to which the vision and the specific goals related to that vision are being accomplished.

(10) The commission shall complete the plan within [18] months after its initial appointment and, upon reviewing and approving it, shall transmit the plan to the governor and the legislature. Thereafter, the commission shall present additional recommendations to the governor and the legislature by [*date*] of each [even-numbered] year and shall monitor the state's progress state toward accomplishing the vision and goals. While working in concert with other state agencies, the commission shall have the authority to develop and implement systems for measurement and accountability.

(11) In addition to any funds appropriated by the legislature to the commission, the commission may accept funds from any other public or private source.

(12) The commission may contract with any public or private entity or any person to assist it in its efforts.

Commentary: State Agency Strategic Plans of Operation

The following model statute directs state agencies to prepare strategic plans for their operations.[60] The plans should preferably be linked to a state comprehensive plan (see Section 4-203). The executive office of the governor would be responsible for reviewing the plans, although some other agency, such as an office of budget and management or the state planning agency, could assume this responsibility.

4-202 State Agency Strategic Plan of Operation

(1) A state agency shall prepare and adopt a strategic plan for the functional areas covered by its operations. Not later than [March 1] of each [even-numbered year], the agency shall issue a plan covering [4] years beginning on that date.

(2) The strategic plan of operation shall include:

(a) a statement of the mission and goals of the state agency;

[60]For an excellent example of such a plan, see Florida Department of Community Affairs (DCA), *Building Partnerships for a Sustainable Florida: 1994-1999 Agency Strategic Plan* (Tallahassee, Fl.: DCA, January 1995).

(b) an identification of the groups of people served by the state agency, their approximate numbers, and, of those groups, those having priorities for receiving service from the agency, either established by law or by the agency;

(c) projections of changes in the character, composition, or size of those groups anticipated during the term of the plan;

(d) an analysis of expected changes in the services provided by the agency due to existing, pending, or potential changes in federal or state laws or regulations, or other factors outside of the control of the agency;

(e) an analysis of the use of the agency's resources to meet current and future needs, and an estimate of additional resources that may be necessary to meet those needs;

(f) a description and a [5]-year schedule of the means and strategies for meeting the agency's needs, including future needs[, an analysis of those means and strategies within the context of goals and policies in the state comprehensive plan described in Section [4-203]], and costs. Means may include organizational or management initiatives, facility or physical infrastructure improvements, or proposals for programs and services. The plan shall indicate the existing statutory authority by which the agency may carry out the means and strategies. If such authority does not exist, the agency may propose additional legislative authority;

(g) a description of benchmarks[61] to measure the output or outcome of the agency's efforts;

(h) in the years following the first year of its adoption, actual benchmark information from agency operations, so that by its [third edition], the plan and all subsequent editions may provide benchmark information for at least the immediately previous [5] years;

(i) an evaluation of the agency's progress in achieving its mission and goals since the previous edition of the plan; and

(j) any other information that the agency may determine is needed in the plan.

(3) The plan shall be prepared in a format and manner prescribed by [the office of the governor *or* the office of management and budget *or* the state planning agency].

(4) Prior to submission of its plan to the [the office of the governor *or* the office of management and budget *or* the state planning agency], each state agency shall hold public hearings and/or

[61]For an example of state benchmarks included in a statute, see Ore. Rev. Stat. §184.007 (Biennial benchmarks; priority).

workshops on the draft plan and shall allow at least a [30]-day period for public comment. A state agency shall publish a notice informing the public of the date, time, and location of the hearings and/or workshops of the availability for inspection or purchase of the draft plan in newspapers of general circulation in the state at least [30] days in advance of the hearings and/or workshops.

(5) Subsequent to the public hearings and/or workshops, the director of the state agency shall submit the plan and a summary of comments received at the hearings and/or workshops to the [office of the governor], which shall review the plans [for consistency with the state comprehensive plan, state land development plan, [and] state biodiversity conservation plan, [and other instructions and directives it may have issued]]. The [office of the governor] shall consider all written comments received in formulating any required revisions. Within [30] days, reviewed plans shall be returned to the agency, together with any required revisions.

(6) The director of the state agency shall, within [30] days of the return of its state agency plan, incorporate all revisions required by the governor and the director of the state agency shall adopt the plan. The state agency shall then transmit copies of its final plan to the governor and to members of the state legislature and shall make the report available to the public. Copies shall be deposited in the state library and shall be sent to all public libraries in the state that serve as depositories for state documents.

(7) State agency strategic plans developed pursuant to this Act are not rules and therefore shall not be subject to [*the state administrative procedures act*].

Commentary: State Comprehensive Plan

The following statutory model describes a state comprehensive plan whose goals and policies are intended to provide direction to state agencies and, if desired, regional agencies and local governments. The descriptions of background analyses and potential topical areas covered in the plan are drafted to give the state wide berth in designing the plan. State agency strategic plans (see Section 4-202) and the state capital budget (Section 4-301 *et seq.*) are to be linked to the state comprehensive plan.

4-203 State Comprehensive Plan

(1) The [state planning agency *or* office of the governor *or* state planning commission] shall, within [36] months of the effective date of this Act, prepare, with the involvement of all state agencies and the citizens of the state, a state comprehensive plan.

(2) The purpose of the state comprehensive plan is to ensure the coordinated, integrated, and orderly social, physical, and economic growth of the state that achieves statewide goals. The plan is to provide a basis for identifying critical issues facing the state, determining state priorities, allocating limited state resources, and harmonizing the plans of various [state *or* state, regional, and local] governmental units.

(3) In preparing the state comprehensive plan, the [state planning agency *or* office of the governor *or* state planning commission] shall undertake supporting studies that are relevant to the topical areas included in the plan, or may use studies conducted by others concerning the future growth of the state, including, but not limited to:

(a) population and population distribution of the state and regions of the state, which may include projections and analyses by age, education level, income, employment, or other appropriate characteristics;

(b) natural resources, which may include air, water, open spaces, scenic corridors or viewsheds, forests, soils, rivers and other waters, shorelines, fisheries, wildlife, and minerals;

(c) geology, ecology, and other physical factors of the state and regions of the state;

(d) agriculture;

(e) the use of land and the conversion of nonurban land to urban use;

(f) the presence, potential for, and mitigation of natural hazards, including the identification of areas within the state subject to natural hazards;

(g) public safety;

(h) the economy of the state and regions of the state, which may include amount, type, and general location of commerce and industry and trends and forecasts in economic activity;

(i) amount, type, quality, affordability, and geographic distribution of housing and relationship of affordable housing to job sites;

(j) existing or emerging technologies in the state and regions of the state;

(k) energy, including its type, availability, and use;

(l) general location and extent of existing or currently planned major transportation facilities of all modes, and utility, recreational, cultural, and other facilities of statewide significance;

(m) governmental organization and intergovernmental relations;

(n) elementary, secondary, undergraduate and postgraduate and vocational education, whether public or private;

(o) human and social services; and

(p) the identification of features of significant statewide architectural, scenic, cultural, historical, or archaeological interest.

(4) The state comprehensive plan shall be composed of goals and policies that are stated in plain, succinct, easily-understandable words. The goals and policies shall be statewide in scope or interest and shall be consistent and compatible with one another, but may address certain regions of the state provided there is a statewide interest in so doing. The plan shall be a direction setting document, giving policy guidance to state agencies[, regional agencies, and local governments]. The plan shall enumerate goals and policies regarding proposed or foreseeable changes in each of the following areas, based on relevant studies in identified in paragraph (3) above, and shall describe how the selected goals and policies were derived from an assessment of their probable social, environmental, economic, and related consequences:

♦ The following list is an example of topical areas that may be covered by a state comprehensive plan.

(a) agriculture;

(b) urbanization;

(c) air quality;

(d) water quality;

(e) natural resources, living and non-living;

(f) natural hazards and disasters;

(g) historic, scenic, and archaeological resources;

(h) economic development;

(i) housing, including affordable housing;

(j) education;

(k) recreational and cultural development;

(l) human and social services;

(m) public safety;

(n) transportation;

(o) technological change;

(p) governmental organization and intergovernmental relations; and

(q) citizen involvement.

(5) Prior to submission of its plan to the [office of the governor], the [state planning agency *or* office of the governor *or* state planning commission] shall hold public hearings and workshops on the draft state comprehensive plan and shall allow at least a [60]-day period for public comment by citizens, affected public agencies, affected employee representatives, and other interested parties.[62] The [state planning agency *or* office of the governor *or* state planning commission] shall publish a notice informing the public of the date, time, and location of the hearings and workshops and of the availability for inspection or purchase of the draft plan in newspapers of general circulation in the state at least [60] days in advance of the hearings and workshops.

[*or*]

(5) The [state planning agency *or* office of the governor *or* state planning commission] shall conduct public hearings and workshops on the draft plan as provided by Section [4-209].

(6) Subsequent to the public hearings and workshops, the [state planning agency *or* office of the governor *or* state planning commission] shall submit the draft plan and a summary of comments received at the hearings and workshops to the [office of the governor] for review [for consistency with any instructions and directives it may have issued]. The [office of the governor] shall consider all written comments received when formulating any required revisions. Within [30] days, the reviewed draft plan shall be returned to the [state planning

[62]Federal regulations require a minimum of 45 days for public review and comment "before procedures and any major revisions to existing procedures are adopted". 23 CFR §450.212(f). Public involvement processes for statewide transportation planning are to be "proactive and provide complete public information, timely public notice, full public access to key decisions, and opportunities for early and continuing involvement." 23 CFR §450.212(a).

agency *or* office of the governor *or* state planning commission], together with any required revisions.

(7) The [state planning agency *or* office of the governor *or* state planning commission]] shall, within [30] days of the return of the draft state comprehensive plan, incorporate all revisions required by the [office of the governor]. The plan shall then be adopted in the manner provided by Section [4-210] and shall be certified in the manner provided by Section [4-211].

(8) The [state planning agency *or* executive office of the governor *or* state planning commission] shall, on a [biennial] basis, review the state comprehensive plan with state agencies significantly affected by the provisions of the particular section under review, and may propose, in writing, amendments to the plan, accompanied by an explanation of the need for such amendments. Such changes shall be approved in the same manner as the adoption of the original plan.

Commentary: State Land Development Plan

If the state decides that it is going to be directly engaged in land development planning, its interests and objectives must be clearly defined. The state's involvement may be justified if:

1. The state has identified land uses or lands with certain characteristics as having a statewide or regional interest (e.g., wetlands, coastal zones, earthquake fault zones, landslide areas, floodplains, and large-scale developments with multijurisdictional impacts, such as regional shopping centers, sports complexes, and airports). Alternately, the state may have determined that certain local land-use decisions may have tremendous impacts on state facilities, such as state parks, scenic highways, or state-financed highway interchanges;

2. The state wishes to ensure that land-use and related plans of regional agencies or local government reflect applicable state goals, policies, and guidelines through a certification process;

3. The state wishes to set statewide guidelines so that certain classes of land uses develop in a specified way in order to achieve certain objectives, as in setting minimum density ranges for urban development in an effort to prevent or reduce urban sprawl;

4. The state wishes to engage in the direct regulation of land development, as in areas of the state where there are no capable governmental units to undertake such regulation or because of the impact of development on state-owned or state-financed facilities; and/or

5. The state wishes to plan for lands that it owns or for which it is otherwise responsible.

The model legislation below provides for a state land development plan that establishes goals, policies, and guidelines for these situations.[63] A land-use plan map is not a necessary component of the state land development plan, although the model legislation makes provision for "maps," should they be desired. Rather, the plan is a framework from which more detailed, site-specific regulations would be crafted, state-level administrative decisions would be made, and regional and local plans would be designed. For example, from a statewide perspective, it may make little difference if an urban growth area boundary is located on one side of a local road or the other; that determination is, generally speaking, a local one (although there might be a state interest if a state route were involved and the ultimate capacity of the road would be affected by the intensity of development along it). On the other hand, the criteria by which such growth areas are mapped and the standards for the intensity or density of land development within the urban growth area would have a statewide applicability and interest.

4-204 State Land Development Plan

(1) The [state planning agency] shall, within [36] months of the effective date of this Act, prepare a state land development plan.

(2) The purposes of the state land development plan are to:

(a) ensure the orderly planning of lands and categories of development which the state has identified as having a state interest; and

(b) provide policy direction for state, regional, and local actions necessary to implement the state comprehensive plan with regard to the physical development of the state.

(3) In preparing the state land development plan, the [state planning agency] shall undertake supporting studies that are relevant to the subject areas identified in paragraph (5) below, or may use studies conducted by others concerning the future growth of the state, including, but not limited to:

(a) population and population distribution of the state and regions of the state, which may include projections and analyses by age, education level, income, employment, or other appropriate characteristics;

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[63]The concept of the state land development plan first appeared in the ALI *Model Land Development Code*, §§8-401 to 8-406.

(b) natural resources, which may include air, water, open spaces, scenic corridors or viewsheds, forests, soils, rivers, and other waters, shorelines, fisheries, wildlife, and minerals;

(c) geology, ecology, and other physical factors of the state and regions of the state;

(d) use of land for various purposes, intensities, housing or population densities, and the rates of conversion of nonurban land to urban use;

(e) the identification and extent of land areas within the state subject to natural hazards and the assessment of the degree of risk associated with those hazards;

(f) the economy of the state and regions of the state, which may include amount, type, and general location of commerce and industry and trends and forecasts in economic activity;

(g) amount, type, quality, affordability, and geographic distribution of housing and relationship of affordable housing to job sites;

(h) general location and extent of existing or currently planned major transportation facilities of all modes, and utility, educational, recreational, cultural, and other facilities of statewide significance; and

(i) the identification of features of significant statewide architectural, scenic, cultural, historical, or archaeological interest.

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(4) In preparing the state land development plan, the [state planning agency] [shall *or* may] take into account existing adopted plans of state and regional agencies and of local governments to the extent such plans are consistent with or do not conflict with state interests.

(5) The state land development plan shall consist of goals, policies, and guidelines in text [and maps] relating to the physical development of the state. The plan may contain goals, policies, and guidelines to:

(a) identify and manage the development of areas of critical state concern pursuant to Section [5-201 *et seq.*];

(b) define the categories of development to be classified as developments of regional impact pursuant to Section [5-301 *et seq.*];

(c) provide the basis for establishing urban growth areas as defined in Section [6-403(1)(a)] and the minimum standards of land-use intensity and net density within them in order that such growth areas may be delineated in regional and local plans;

(d) direct the planning and the development of land in or surrounding state transportation corridors, public transportation corridors, interchanges on limited access facilities, and airports of regional or state significance;

(e) identify [a hierarchy of] urban and rural growth centers for the purposes of state infrastructure and other investment;

(f) identify actions to improve the ability of the state and other governmental units to prevent or minimize damages from future disasters that affect land and property subject to natural hazards;

(g) establish priorities for state acquisition of land and interests in land for natural resources protection, scenic corridor or viewshed protection, open space and recreational needs, water access, and natural hazard mitigation purposes;

(h) set forth approaches to establish solutions to the need for affordable housing;

(i) provide for the integration of the state's policy for its physical development in the areas of air quality, transportation, and water resources, with particular respect to federal laws and regulations;

(j) define specific regional and local levels of responsibility in the preparation of comprehensive plans to ensure consistency of those plans with the state land development plan[, the state biodiversity conservation plan,] and the state comprehensive plan; and

(k) manage land that is owned or leased by, or is otherwise under the control of, the state.

(6) Prior to submission of its plan to the [office of the governor], the [state planning agency] shall hold public hearings and workshops on the draft state land development plan and shall allow at least a [60]-day period for public comment by citizens, affected public agencies, affected employee representatives, and other interested parties.[64] The [state planning agency] shall publish a notice informing the public of the date, time, and location of the hearings and workshops and of the availability for inspection or purchase of the draft plan in newspapers of general circulation in the state at least [60] days in advance of the hearings and workshops.

[*or*]

[64]Federal regulations require a minimum of 45 days for public review and comment "before procedures and any major revisions to existing procedures are adopted". 23 CFR §450.212(f). Public involvement processes for statewide transportation planning are to be "proactive and provide complete public information, timely public notice, full public access to key decisions, and opportunities for early and continuing involvement." 23 CFR §450.212(a).

(6) The [state planning agency] shall conduct public hearings and workshops on the draft plan as provided by Section [4-209].

(7) Subsequent to the public hearings and workshops, the [state planning agency] shall submit the draft plan and a summary of comments received at the hearings and workshops to the [office of the governor], which shall review the draft plan for consistency with the state comprehensive plan[, [and] state biodiversity conservation plan,][and any other instructions and directives it may have issued]. The [office of the governor] shall consider all written comments received when formulating any required revisions. Within [30] days, the reviewed draft plan shall be returned to the [state planning agency], together with any required revisions.

(8) The [state planning agency] shall, within [30] days of the return of the draft state land development plan, incorporate all revisions required by the [office of the governor]. The plan shall then be adopted in the manner provided by Section [4-210] and shall be certified in the manner provided by Section [4-211].

(9) The [state planning agency] shall, on a [biennial] basis, review the state land development plan in consultation with governmental agencies, organizations, and persons affected by the plan, and may propose, in writing, amendments to the plan, accompanied by an explanation of the need for such amendments. Such changes shall be approved in the same manner as the adoption of the original plan.

Commentary: State Biodiversity Conservation Plan[65]

Several states, including Florida, Maryland, and New Jersey, have developed statewide biodiversity conservation plans. These state biodiversity conservation plans map important conservation areas throughout the state by considering the full spectrum of species including plants, invertebrates, natural communities (e.g., various types of grasslands, forests, etc.) as well as more traditional targets such as mammals, birds, and other vertebrates. By identifying key wildlife areas across the state, such plans seek to proactively address the most pressing threat to biodiversity in this country, namely the degradation and loss of habitat.[66] Biodiversity plans are becoming more

[65]The commentary and model statute in this Section were developed with the assistance of Laura Hood Watchman, a conservation biologist with Defenders of Wildlife, in Washington, D.C., and Caron Whitaker, smart growth and wildlife coordinator, National Wildlife Federation, Washington, D.C. Ms. Watchman and Ms. Whitaker also suggested the inclusion of the model statute in the *Legislative Guidebook*.

[66]D.S. Wilcove *et al.*, "Leading Threats to Biodiversity: What's Imperiling U.S. Species," in *Precious Heritage: The Status of Biodiversity in the United States*, B.A. Stein, L.S. Kutner, and J.S. Adams, eds. (New York: Oxford University Press, 2000), 239-254.

common because improving biological information and geographic information systems (GIS) have allowed states to do regional assessments of biodiversity. Conservation biologists and policy makers alike recognize the need for map-based information on important areas for biodiversity. This information is ideally suited for: (1) guiding open space acquisition; (2) integration with state, regional and local comprehensive plans; (3) improving the process of environmental decision-making (including permit review). A statewide plan provides a framework for consistency in state, local and private land conservation efforts, instead of piecemeal permitting and habitat destruction that nibbles away at important habitat and marginal habitat alike. This large-scale perspective is also necessary for identifying the large areas and wildlife corridors that are needed to maintain biological diversity, as well as areas where development and other activities would have little impact to biodiversity.

Generally, the comprehensive biodiversity planning efforts to date make use of existing biodiversity survey and habitat information. The goal of the plans is to identify a network of locations that best represent the native biodiversity with enough acreage, redundancy and connectivity so as to allow for ecosystems and their species to persist into the future. In each state, a natural heritage program (often located within a state department of natural resources or state fish and wildlife agency) inventories the state for rare species and vegetation types. This information is available to planners from the programs through the Association for Biodiversity Information, a non-governmental organization that supports and binds together the state heritage programs with standard methods.[67] Additional information may be necessary to ensure comprehensive coverage. Information is also available from the federal government, especially the Gap Analysis Program that develops and supplies map-based wildlife habitat information for state conservation planning in each of the 50 states. As of January 2001, 39 state analyses had been completed and the remaining states are all underway.[68] NOAA's Coastal Change Analysis Program also provides habitat data for aquatic and terrestrial species in coastal watersheds, offshore coral reefs, algae, and seagrass beds in the photic zone.[69] The health of these near shore habitats depends in part on the land-use decisions, and therefore should be considered in land use planning. Additional information can be considered, including state biological expert opinion, existing natural areas, recovery and management plans, and other federal datasets (FEMA 100-year flood-plains, National Wetlands Inventory, etc.) are also included.

A major source of maps and information for state biodiversity conservation plans are ecoregional plans that The Nature Conservancy (TNC) is developing throughout the U.S. Ecoregional plans

[67]See generally B.A. Stein, L.S. Kutner, and J.S. Adams, eds., *Precious Heritage: The Status of Biodiversity in the United States*, (New York: Oxford University Press, 2000), 23-34.

[68]**http://www.gap.uidaho.edu**, January 18, 2001. See also U.S. Geological Survey Gap Analysis Program. *A Handbook for conducting Gap Analysis*, http://www.gap.uidaho.edu/handbook (version current as of February 24, 2000).

[69]National Oceanic and Atmospheric Administration Coastal Change Program: Guidance for Regional Implementation, **http://www.csc.noaa.gov/crs/lca/protocol.html#c1p2,** January 18, 2001.

seek to ensure "the long term survival of all viable native species and community types through the design and conservation of portfolios of sites within ecoregions"[70] The plans that TNC offices produce should be valuable resources for planners in that they identify important biological areas using heritage program information and expert biological opinion.

(1) *Florida*. In 1994 Florida's Game and Freshwater Fish Commission produced a comprehensive state biodiversity plan entitled *Closing the Gaps in Florida's Wildlife Habitat Conservation System* that not only identified existing conservation lands, but also additional areas that would be necessary to protect the state's wildlife including rare plants, animals, and vegetation types.[71] In total 33 percent of the state was identified as important conservation areas; two-thirds of the areas were in public ownership. This effort was expanded upon by the Florida Greenways program which focused more on the connectivity of the conservation areas yielding another comprehensive state map, the Florida Ecological Network. This Network displays important conservation and open space areas similar to the Maryland GIA discussed below.[72] Under Florida statute,[73] Florida's Department of Environmental Protection (DEP) is currently responsible for planning greenways, and the Florida Greenways and Trails Coordinating Council assists and advises DEP.[74] The Greenways program informs the state's land acquisition efforts; the Florida Forever Act of 1999 provides $3 billion over 10 years for conservation and recreational lands acquisition.[75]

(2) *Maryland.* Through a combination of mapping, and linking and protecting natural areas, the Maryland GreenPrint program will allow Maryland to preserve a statewide conservation network. Formalized in 2001, the program is scheduled to receive a projected total of $145 million over five years. The program will also coordinate with the existing land preservation efforts under Maryland's Program Open Space and Rural Legacy Programs. For the mapping component of the GreenPrint program, the Maryland Department of Natural Resources (DNR) created a Green Infrastructure Assessment (GIA) to identify a network of greenways that serves to link together and protect the most critical remaining lands before they are lost or fragmented. A proactive use of available information developed by different state and federal agencies, the GIA uses GIS and

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[70]C. *Groves et al.*, *Designing a Geography of Hope: A Practitioner's Handbook for Ecoregional Conservation Planning* (Arlington, Va.: The Nature Conservancy, 2000), iii-v.

[71]J. Cox, R. Kautz, M. MacLaughlin, and T. Gilbert, *Closing the Gaps in Florida's Wildlife Habitat Conservation System* (Tallahassee, Fl.: Florida Game and Freshwater Fish Commission, 1994).

[72]T. Hoctor, M.H. Carr, and P.D. Zwick, "Identifying a Linked Reserve System Using a Regional Landscape Approach: The Florida Ecological Nework," *Conservation Biology*, Vol. 14, no. 4 (1999): 984-1000.

[73]F.S.A. §20.255(2)(a)(6) (West 2000). A similar authority exists with the New Jersey Department of Environmental Protection to administer grants for land acquisition for open space, greenways, and conservation purposes. N.J.S.A. 13:8C-24 (West 2000) (establishing Office of Green Acres).

[74]F.S.A. §260.0142.

[75]F.S.A. §§259.105 *et seq*.

principles of landscape ecology to identify hubs, nodes, and corridors for protection and/or restoration. The goal of the project is to "identify an ecologically sound open space network, and ultimately, to incorporate the agreed upon network into local land conservation planning"[76]. DNR has conducted workshops with representatives from each county's planning and zoning department, parks and recreation department, and others to review the maps and the GIS model. Because much of the network also serves recreational needs, the Maryland Greenways Commission implements the GreenPrint program.[77]

(3) *New Jersey.* The Landscape Project, initiated by the New Jersey Division of Fish Game and Wildlife's Endangered and Non-game species program in 1994, is an ecosystem-level approach to the long-term protection of rare species and critical habitat throughout the state of New Jersey. The goal of the project is "to protect New Jersey's biological diversity by maintaining and enhancing rare wildlife populations within healthy functioning ecosystems."[78] The project seeks to make scientifically sound information easily accessible to planning and protection programs throughout the state. The products may serve as the basis for developing habitat protection ordinances, critical habitat zoning, or acquisition and management projects. The project also anticipates their products will reduce endangered and threatened species conflicts through better planning. GIS maps are available for downloading through the New Jersey Department of Environmental Protection web site www.state.nj.us/dep/gis.

(4) *Oregon.* A diverse set of private stakeholders came together to collaboratively develop a statewide strategy for conserving Oregon's biological diversity. The product of those labors is a 1998 publication, *Oregon's Living Landscape*, which describes each one of the state's ecological regions and maps out conservation opportunity areas for the entire state.[79] Although the plan is not state authorized, it does provide a good model state biodiversity conservation plan because of its inclusive process and reliance on existing information and expertise within the state. As a result of the effort, Oregon's governor appointed a task force to work toward implementing the plan in the Willamette Valley, including the city of Portland.

MODEL STATUTE

Section 4-204.1 below is model statute for a state biodiversity conservation plan prepared by a state department of natural resources, fish and wildlife agency, or other designated state agency. Based in part on the approach in the 1994 Florida report described above, the state plan is intended

[76]T. Weber and J. Wolf, "Maryland's Green Infrastructure–Using Landscape Assessment Tools to Identify a Regional Conservation Strategy," *Environmental Monitoring and Assessment*, no. 63 (2000): 265-277.

[77]http://www.dnr.state.md.us/greenways/greenprint, July 27, 2001. Maps from the Maryland Atlas of Greenways, Water Trails, and Green Infrastructure may be viewed and ordered from this site.

[78]http://www.state.nj.us/dep/fgw/lndscpe.htm. January 19, 2001.

[79]Defenders of Wildlife, *Oregon's Living Landscape: Strategies and Opportunities to Conserve Biodiversity* (Lake Oswego, Ore.: The Author, 1998).

to identify land areas in the state where actions should be taken to manage and conserve the state's biodiversity resources, in particular to protect key focal species. The model describes a series of underlying studies and analyses that should be undertaken to provide a basis for formulating goals, policies, and guidelines as well as implementing measures. The process for preparing and adopting the plan is similar to that for the state transportation plan (Section 4-205, below) and other plans with statewide application.

4-204.1 State Biodiversity Conservation Plan

(1) The [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall, within [24] months of the effective date of this Act, prepare a state biodiversity conservation plan.

(2) The purposes of the state biodiversity conservation plan are to to identify land areas in the state that must be conserved and managed in order to ensure the long-term survival of the state's biodiversity resources and to propose goals, policies, guidelines, and implementing actions to conserve and manage these resources.

(3) In preparing the state biodiversity conservation plan, the [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall undertake supporting studies, or may utilize studies conducted by others concerning, but not limited to, the following:

(a) mapped and written descriptions of statewide land cover, including an identification of natural vegetation, wetland communities, arid lands, and disturbed land cover;

(b) an inventory and assessment of federally [and state] listed endangered and threatened plant and animal species, rare and endemic species, umbrella and indicator species, species that are commercially important in the state, their habitat, including food source, denning and nursery areas, and migratory routes; and changes in their population and habitat, to the extent such information is available;

(c) mapped and written descriptions of public lands capable of providing long-term protection for federal [and state] endangered and threatened species, including national parks, forests, preserves, recreation areas, wildlife refuges, and military lands; state parks, preserves, and forests; state-owned wildlife management areas; water management district lands; nature preserves owned by local government; and private lands owned or managed by conservation groups. Such descriptions may include any limitations or threats to the ability of such lands to provide long-term protection for these species, including, but not limited to, outdoor recreation, fire

suppression, noise pollution, runoff and sedimentation; and loss of migratory corridors within such lands;

(d) studies supporting the designation of areas of critical state concern pursuant to Sections [5-201] *et seq*.;

(e) description and analysis of factors contributing to the loss of biological diversity, including the species described in subparagraph (b) above; and

(f) an analysis of the impact of existing adopted plans of state and regional agencies and of local governments and plans being proposed for adoption to the extent that they affect or may affect biodiversity resources of the state.

(4) The state biodiversity conservation plan shall consist of:

(a) summaries of and maps based on relevant studies described in paragraph (3) above;

(b) goals, policies, and guidelines that, at a minimum, describe state priorities in managing and conserving biodiversity resources and state coordination of the management of biodiversity resources with efforts of federal and regional agencies and local governments, and of private conservation organizations;

(c) the identification of focal species and, in mapped and written form, land areas that are their habitat for the purposes of habitat management and conservation;

(d) implementing actions, including, but not limited to, proposals for: changes in state administrative rules and state agency procedures; legislation; design guidelines for state capital projects; acquisition of land and interests in land; transfer of development rights; mitigation banking; other relevant actions by state and regional agencies and local governments, and private organizations and individuals, including measures to manage and conserve the habitat areas (including food source, denning, and nursery areas and migratory routes) of focal species; costs and sources of funding for implementing actions; and the agency or agencies responsible for implementation; and

(e) benchmarks by which changes in the state's biodiversity may be monitored over time.

(5) Prior to submission of its plan to the [office of the governor], the [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall hold public hearings and workshops on the draft state biodiversity conservation plan and shall allow at least a [60]-day period for public comment by citizens, affected public

agencies, affected employee representatives, and other interested parties.[80] The [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall publish a notice informing the public of the date, time, and location of the hearings and workshops and of the availability for inspection or purchase of the draft plan in newspapers of general circulation in the state at least [60] days in advance of the hearings and workshops.

[*or*]

(5) The [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall conduct public hearings and workshops on the draft plan as provided by Section [4-209].

(6) Subsequent to the public hearings and workshops, the [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall submit the draft state biodiversity conservation plan and a summary of comments received at the hearings and/or workshops to the [office of the governor], which shall review the draft plan for consistency with the state comprehensive plan [and] state land development plan [and any other instructions and directives it may have issued]. The [office of the governor] shall consider all written comments received when formulating any required revisions. Within [30] days, the reviewed plan shall be returned to the [department *or* agency], together with any required revisions.

(7) The [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall, within [30] days of the return of the draft state biodiversity conservation plan, incorporate all revisions required by the [office of the governor]. The plan shall then be adopted in the manner provided by Section [4-210] and certified in the manner provided by Section [4-211].

(8) The [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall, on a [biennial] basis monitor the benchmarks contained in the state biodiversity conservation plan and shall review the plan with state agencies and other agencies, organizations and individuals significantly affected by the provisions of the particular section under review, and may propose, in writing, amendments to the plan, accompanied by an explanation of the need for such amendments. Such changes shall be approved in the same manner as the adoption of the original plan.

[(9) A state biodiversity conservation plan prepared and adopted pursuant to this Section shall, in and of itself, have no regulatory effect on land areas it identifies as habitat for focal species.]

[80]Federal regulations require a minimum of 45 days for public review and comment "before procedures and any major revisions to existing procedures are adopted". 23 CFR §450.212(f). Public involvement processes for statewide transportation planning are to be "proactive and provide complete public information, timely public notice, full public access to key decisions, and opportunities for early and continuing involvement." 23 CFR §450.212(a).

- The state biodiversity conservation plan is not self -executing; it is not a regulation, but is instead a policy document for the guidance of state government action, including specific regulatory and capital project decisions.

FUNCTIONAL PLANS

Some states will have specialized functional plans dealing with housing (as in New Jersey)[81] or transportation (as in Oregon and Minnesota)[82] that are not prepared by the lead planning agency, but by other boards and departments (such as New Jersey's Council on Affordable Housing and the Oregon State Transportation Commission). Still others may have specialized plans addressing areas such as solid waste.[83] The following sections propose statutory models for transportation, economic development, and different types of housing plans or state approaches that ensure the availability of affordable housing.

Commentary: State Transportation Plan

The state transportation plan statutory description has been drafted to be generally consistent with the requirements of the Federal Intermodal Surface Transportation Efficiency Act of 1991 and the subsequent Federal Transportation Equity Act for the 21st Century, passed in 1998. The details of the planning requirements are located in federal statutes.[84] Here, however, the model statutory language is primarily directed at describing the contents of the state plan document itself rather than factors that must be taken into consideration when developing the plan and the projects and strategies contained within it, which is the emphasis in the federal statute. Federal statutes do not require inventories of modal and multimodal facilities and population, employment, land-use, and transportation forecasts. Because it is difficult to imagine a transportation plan that does not have

[81]N.J.S.A. §52:27D-307 (Duties of the Council on Affordable Housing).

[82]Oregon Department of Transportation (ODOT), *Oregon Transportation Plan*, adopted by the Oregon Transportation Commission, September 15, 1992 (Salem: ODOT, Strategic Planning Section 1992); Minnesota Department of Transportation, *Minnesota Statewide Transportation Plan, MnDOT Final Draft* (St. Paul: MnDOT, January 1995). The Oregon Plan is specifically authorized by Ore. Rev. Stat. 184.618 (1993). The Minnesota Plan is authorized by Minn. Stat. 174.03 (1994).

[83]See, e.g., Ohio Rev. Code §3734.50 (state solid waste management plan) (1995); Ind. Stat. Ann. §13-9.5-3-1 *et seq.* (state solid waste management plan) (1995).

[84]The statewide planning requirements appear at 23 U.S.C.A. §135. Federal regulations governing statewide transportation planning are contained in 23 CFR §450.

these supporting studies, the model statute, in Section 4-205(3), includes them. The model language also assumes the existence of a state comprehensive plan (see Section 4-203) and a process for reviewing functional plans against it. This language can be deleted, should there be no state comprehensive plan.

4-205 State Transportation Plan

(1) The [state department of transportation] shall, within [24] months of the effective date of this Act, prepare a state transportation plan.[85] With respect to metropolitan areas of the state, the [department] shall prepare the plan in cooperation with metropolitan planning organizations designated for metropolitan areas pursuant to Section 134(b) of Title 23, United States Code. [With respect to areas of the state under the jurisdiction of an Indian tribal government, the [department] shall develop the plan in cooperation with such government and the U.S. Secretary of the Interior.]

(2) The purposes of the state transportation plan are to:

(a) guide, balance, and coordinate transportation activities in the state, in conjunction with other related activities;

(b) ensure that transportation planning addresses and maximizes the potential of all existing and developing modes; and

(c) provide for convenient accessibility by all citizens to jobs, housing, education, recreation, and other activities and uses.

(3) In preparing the state transportation plan, the [state department of transportation] shall undertake supporting studies that are relevant to the topical areas included in the plan, or may utilize studies conducted by others concerning, but not limited to, the following:

(a) inventories of modal and multimodal transportation facilities and services in the state;

(b) forecasts of population, employment, land use, and transportation, by mode, for a [20]-year period; and

(c) identification and evaluation of transportation system alternatives with respect to intensity of use, public and private costs, impacts on economic development, land

[85]The federal statutes impose no deadline for completing a plan; however, if no deadline is imposed, the plan may never be completed.

use, energy consumption, the environment (including air quality and biodiversity cobnservation), safety, and consistency with state goals and policies.

(4) The state transportation plan shall consist of the following elements:

(a) a policy element that defines statewide transportation goals and policies. The policy element may address: the coordination of transportation modes; the relationship of transportation to land use, economic development, the environment (including air quality), and energy consumption; the coordination of transportation among federal, state, regional, and local plans; transportation financing and pricing; designation of scenic highways; transportation signage (including signage that directs tourists); context-sensitive highway design; and transportation safety.

(b) a system element in text and maps that proposes a coordinated transportation system for the state consisting of a multimodal network of facilities and services to be developed over a [20]-year period for air, rail, state and federal highways, public transit, waterways, ports and waterborne transit, bicycle transportation, pedestrian walkways, and other modes to support the goals and policies in the policy element. The system element shall include summaries of supporting studies identified in paragraph (3) above, an identification of corridors and transportation facilities of statewide significance, and statements of minimum levels of service that describe the performance for each mode in order to meet the goals and policies of the plan.

(c) an implementation element that contains a long-range program of actions to achieve statewide transportation goals and policies over the next [20] years. The implementation element may include proposed transportation projects, their priorities and estimated costs, including sources of funding, identification of responsibilities by local units of government or governmental agencies, and public or private providers of transportation, proposals for legislation, and other relevant measures. [The implementation element may be in a form or may include contents to satisfy the requirements for a transportation improvement program as described in Section 135(f) of Title 23, United States Code).]

(5) Prior to submission of its plan to the [office of the governor], the [state department of transportation] shall hold public hearings and workshop] on the draft plan and shall allow at least a [60]-day period for public comment by citizens, affected public agencies, representatives of transportation agency employees, other affected employee representatives, private providers of transportation, and other interested parties.[86] The [department] shall publish a notice informing the public of the date, time, and location of the hearings and

[86]Federal regulations require a minimum of 45 days for public review and comment "before procedures and any major revisions to existing procedures are adopted". 23 CFR §450.212(f). Public involvement processes for statewide transportation planning are to be "proactive and provide complete public information, timely public notice, full public access to key decisions, and opportunities for early and continuing involvement." 23 CFR §450.212(a).

workshops and of the availability for inspection or purchase of the draft plan in newspapers of general circulation in the state at least [60] days in advance of the hearings and workshops.

[*or*]

(5) The [department] shall conduct public hearings and workshops on the plan as provided by Section [4-209].

(6) Subsequent to the public hearings and workshops, the [state department of transportation] shall submit the plan and a summary of comments received at the hearings and workshops to the [office of the governor], which shall review the plan for consistency with the state comprehensive plan, state land development plan, [[and] state biodiversity conservation plan,] [and any other instructions and directives it may have issued]. The [office of the governor] shall consider all written comments received when formulating any required revisions. Within [30] days, the reviewed plan shall be returned to the [department], together with any required revisions.

(7) The [state department of transportation] shall, within [30] days of the return of the state transportation plan, incorporate all revisions required by the [office of the governor]. The plan shall then be adopted in the manner provided by Section [4-210] and shall be certified in the manner provided by Section [4-211].

(8) The [state department of transportation] shall, on a [biennial] basis, review the state transportation plan with state agencies significantly affected by the provisions of the particular section under review, and may propose, in writing, amendments to the plan, accompanied by an explanation of the need for such amendments. Such changes shall be approved in the same manner as the adoption of the original plan.[87]

Commentary: State Economic Development Plan

All states undertake economic development to one degree or another. The activity may be centralized in a department of development or similar agency or dispersed through several departments.[88] The state economic development plan described below is a form of strategic planning

[87]Federal regulations require that the plan "be continually evaluated and periodically updated as appropriate." 23 CFR §450.216(e).

[88]See Scott A. Woodard, "A Strategic Approach to State Economic Development: The Colorado Experience," in *Economic Development Strategies for State and Local Governments*, Robert P. McGowan and Edward J. Ottensmeyer, eds (Chicago, Ill.: Nelson-Hall, 1993), 65-73; David K. Hartley, *State Economic Resource Planning: Four State*

by which the state assesses its strengths and weaknesses with respect to other states and its place within the national economic environment and proposes a series of strategies to encourage job growth and broadened economic opportunity.[89] The plan will likely be prepared by a state department of development, although it could also be prepared by the office of the governor or a special statewide task force created for the purpose.[90]

4-206 State Economic Development Plan

(1) The [state department of development] shall, within [18] months of the effective date of this Act, prepare a state economic development plan.

(2) The purposes of the plan are to define the state's role in encouraging job growth, particularly in relation to the availability of housing and transportation, broadening job opportunity, stimulating private investment, and enhancing and balancing regional economies.

(3) In preparing the state economic development plan, the [state department of development] shall undertake supporting studies that are relevant to the topical areas included in the plan, or may utilize studies conducted by others concerning, but not limited to, the following :

(a) job growth or decline by industry sector on a national, statewide, or regional basis;

(b) future workforce and skill requirements of existing and potential industries in the state and its regions;

(c) population change and characteristics for the state and its regions;

Examples, State Planning Series 15 (Washington, D.C.: Council of State Planning Agencies, 1977); Commonwealth of Massachusetts, *Choosing to Compete: A Statewide Strategy for Job Creation and Economic Growth* (Boston, Mass.: Executive Office of Economic Affairs, May 1993); and Minnesota Department of Trade and Economic Development, *Economic Blueprint* (St. Paul, Minn.: The Department, November 1992).

[89]For examples of this type of analysis, albeit at a regional or local scale, see Mary L. McLean and Kenneth P. Voytek, *Understanding Your Economy: Using Analysis to Guide Local Strategic Planning* (Chicago, Ill.: APA Planners Press, 1992); Edward J. Blakely, *Planning Local Economic Development: Theory and Practice*, 2d edition (Thousand Oaks, CA: Sage, 1994).

[90]See, e.g., 20 ILCS §605/46.44 (1993) describing the requirements for an "economic development strategy" for the state to be prepared and regularly updated by the Illinois Department of Commerce and Community Affairs.

(d) assessments of the state's locational characteristics with respect to access to transportation to markets for its goods and services, and its natural, technological, educational, and human resources in comparison with other states;

(e) the economic value of the state's natural, cultural, historic, and scenic resources to the state's tourism development.

(f) patterns of export and import activity for the state and its regions;

(g) patterns of private investment or disinvestment in plants and capital equipment in the state and its regions;

(h) patterns of unemployment in the state and its regions;

(i) opinions of public and private officials, through surveys, public hearings, and other means, as to the appropriate roles of the state in economic development and the state's competitive strengths and weaknesses;

(j) assessments of institutional structures within state government for encouraging economic development; and

(k) assessments of regulations and permitting procedures imposed by the state upon new development and upon commercial and industrial enterprises and their effects on the cost of doing business as well as their effect on the attraction and retention of jobs and firms in the state.

(4) The state economic development plan shall consist of summaries of relevant studies described in paragraph (3) above, and goals, policies, and implementing strategies by which state agencies may improve the state's business environment. The implementing strategies shall include, but shall not be limited to, changes in the programs or organization of state agencies, new or amended state legislation (such as changes in state tax policies), state capital investment, partnerships with private, governmental and nonprofit organizations, changes in programs of education and training, and estimates of the costs of such changes, legislation, or programs. The plan shall also propose benchmarks by which changes in the state's economy and factors contributing to economic change can be measured over time.

(5) Prior to the submission of its plan to the [office of the governor], the [state department of development] shall hold public hearings and workshops on the draft plan and shall allow at least a [60]-day period for public comment [by citizens, affected public agencies, representatives of private and nonprofit organizations, labor unions, educational and training institutions, and other interested parties]. The [department] shall publish a notice informing the public of the date, time, and location of the hearings and workshops and of the availability for inspection or purchase of the draft plan in newspapers of general circulation in the state at least [60] days in advance of the hearings and workshops.

[*or*]

(5) The [department] shall conduct public hearings and workshops on the plan as provided by Section [4-209].

(6) Subsequent to the public hearings and workshops, the [state department of development] shall submit the plan and a summary of comments received at the hearings and workshops to the [office of the governor], which shall review the plan for consistency with the state comprehensive plan, state land development plan, [[and] state biodiversity conservation plan,] [and any other instructions and directives it may have issued]. The [office of the governor] shall consider all written comments received when formulating any required revisions. Within [30] days, the reviewed plan shall be returned to the [department], together with any required revisions.

(7) The [state department of development] shall, within [30] days of the return of the state economic development plan, incorporate all revisions required by the governor. The plan shall then be adopted in the manner provided by Section [4-210] and certified in the manner provided by Section [4-211].

(8) The [state department of development] shall, on a [biennial] basis, review the state economic development plan with state agencies significantly affected by the provisions of the particular section under review, and may propose, in writing, amendments to the plan, accompanied by an explanation of the need for such amendments. Such changes shall be approved in the same manner as the adoption of the original plan.

Commentary: State Telecommunications and Information Technology Plan[91]

Telecommunications and the information revolution are the most significant forces shaping the nation's economy and our communities. New telecommunications technologies and applications are changing how we communicate and how and where we live and work. A comprehensive understanding of them, the industries that provide them, and the government policies and regulations that affect those industries is certainly important for the businesses that rely on them to deliver services and remain competitive. That understanding is also important, however, for elected officials, planners, and citizens who play an active role in determining how telecommunications technologies and industry will affect a community's economic well-being, its architectural, aesthetic, and cultural character, and the day-to-day activities of its citizens.

Historically, telecommunications meant basic services like telegraph, telephone, telex, television, and radio. Until very recently, these services had been regulated by the federal government as monopolies. The presence of the federal government in regulating and directing the industry resulted in telecommunications being largely ignored by local government officials. Local governments dealt with communication firms on a limited basis, such as contracting for use of public rights-of-way and local franchising. Today, telecommunications refers to a diverse industry that has expanded to include telephone service (both local and long distance), wireless, microwave, satellite, cable, video, and, with the addition of the computer, transmission of voice, data, and video along with sophisticated networks of electronic mail, telecommuting, and video conferencing. New technologies are continually being added by a number of industries.

The greatest regulatory change occurred with the passage of the Telecommunications Act of 1996.[92] Prior to this, the industry was guided by the Communications Act of 1934.[93] The 1934 legislation created and maintained protected telecommunications monopolies at both the federal and state levels. Under this earlier legislation, the industry and the resulting monopolies were controlled

[91]Portions of this Commentary and the model statute that follows are based on "Creating Effective State and Local Telecommunications Plans, Regulations, and Networks: Models and Recommendations" by Barbara Becker, AICP, and Susan Bradbury, in *Modernizing State Planning Statutes: The Growing Smart Working Papers, Vol. 2*, Planning Advisory Service Report No. 480/481 (Chicago: American Planning Association, September 1998). The preparation of the working paper, the commentary, and the model statute was supported by a grant from the Siemens Corporation. See also the commentary to Section 7-206.1, the telecommunications component of a community facilities element of a local comprehensive plan.

[92]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The Act can also be found on the Federal Communications Commission website: www.fcc.gov/telecom.html.

[93]47 U.S.C. §151 *et seq.* (1997).

and regulated by the Federal Communications Commission (FCC) and state and local public utility commissions (PUCs). These commissions determined through franchises and licensing agreements where companies could provide service, the nature of the services provided, and the rates that could be charged. This created a closely regulated industry, and one with little or no competition. As Congress began to deregulate other industries in the 1980s, it opted to deregulate the communications industry. The antitrust rulings that divested the Bell System and opened the long-distance telephone market to fair competition[94] were really the beginning of a shift toward competition and less government regulation that resulted in the Telecommunications Act of 1996.

The Telecommunication Act of 1996 allows long distance operators, local telephone providers, and cable companies to compete in each other's markets. The Act is primarily focused on introducing competition. The rationale behind the legislation is that competition will result in lower prices and better quality. The full implications of the Act will not be known for some time as the FCC continues to go through the rule-making process that will implement it.

THE STATE ROLE: TELECOMMUNICATIONS AND ECONOMIC DEVELOPMENT

The state is in a unique position in regards to the regulation of, and the promotion of development of, telecommunications within its borders. With modern technology, telecommunications is truly an enterprise that crosses and transcends state boundaries. And though deregulation has occurred to some degree through the Telecommunications Act of 1996, the Federal Communications Commission still has a role in the regulation of telecommunications providers. On the other hand, the placement of telecommunication facilities is a land-use question, within the purview of the local governments. Indeed, the issue of facility placement often becomes highly contested at the local level often over the issue of aesthetics..

Nevertheless, the state has a role to play in the regulation and the development of telecommunications networks. State utility commissions regulate the rate of "natural monopoly" service providers (although some utility regulation is handled by local governments). The state legislature can enact or amend enabling legislation to balance the facilities placement issue. Economic development agencies can enter into partnerships with private telecommunications and computer firms to provide service to those who do not have it and to upgrade service where it exists, thus attracting and encouraging economic growth. Educational agencies can also cooperate with service providers to provide computers and communication access to teachers and students who can use these resources in more engaging and efficient education.

Then, there is the role of the state government as a consumer of telecommunications services and computer equipment and software. Even in the smallest of states, a state government is a large enterprise with executive, judicial, and legislative agencies, all of which have information needs of their own and also the need to share information in a timely manner with other agencies. Some of that demand for computers and telecommunications involves the speedy relay upon demand of vast

[94] *MCI v. AT&T*, 708 F.2d 1081 (7th Cir. 1982), *cert den'd* 464 U.S. 891; *U.S. v. AT&T*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom Maryland v. U.S.*, 460 U.S. 1001 (1983); *U.S. v. Western Electric*, 569 F. Supp. 990 (D.D.C. 1983).

amounts of information. Some involves making information readily available to those who need it while maintaining those data sources secure from those who do not. And some of that telecommunication service includes the maintenance of reliable and rapid communications among law enforcement, medical, and other emergency management agencies during disasters. The state government needs the latest technology at a reasonable cost in order to carry out the daily tasks of governance.

Several states have already addressed this vital issue through legislation or other programs. Some states have express telecommunications planning requirements. Vermont requires its department of public services to prepare a state telecommunications plan to cover a ten-year period.[95] The Vermont statute covers both private and governmental telecommunications, and requires the telecommunications plan to include a ten-year overview of state growth and development as it relates to telecommunications demand, a survey of the demand of private telecommunications users, an assessment of the existing system, and an evaluation of alternative proposals for improving the system.[96] Alaska has created a telecommunications information council, which is directed to prepare short-range and long-range information systems plans for the state government and to prepare guidelines for state agencies to formulate information systems plans which are to be "in accordance with" the state plans.[97]

In Washington, a Governor's Telecommunication Policy Coordination Task Force was established by executive order in 1994. The task force was charged with assessing current telecommunications policies and recommending ways that Washington could better attract telecommunications companies and the jobs and services they provide while encouraging the deployment of advanced networks to the state's businesses and residents. The 11-member task force drew from state executive and legislative branches. It assessed the economic trends affecting growth and development of various sectors of the state telecommunications industry, how the state tax structure may be affecting telecommunications development,[98] and the overall effect of state policies to promote effective use of telecommunications to improve service to the state's citizens.[99]

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[95]Vt. Stat., tit. 30, § 202d (1997).

[96]Id.

[97]Alaska Stat. §44.19.504 (1997).

[98]Governor's Telecommunications Policy Coordination Task Force, *Telecommunications Infrastructure in Washington State* (Olympia, Wash.: The Task Force, Office of the Governor, April 1996), www.wa.gov/ttf.

[99]Governor's Telecommunications Policy Coordination Task Force, *Telecommunications in Washington State: Implementing the Telecommunications Act of 1996 and Tax Alternatives* (Olympia, Wash.: The Task Force, Office of the Governor, January 1997), www.wa.gov/ttf.

Georgia centralized control and development of telecommunications in one agency, the department of administrative services, which is obligated by law to develop and implement a plan for state government telecommunications.[100] Through that agency, and utilizing revenue from a universal services fund,[101] Georgia operates the Georgia Statewide Academic and Medical System, utilizing satellite links to facilitate teleconferencing, including university courses, public hearings, and telemedicine. Along the same lines, Iowa has created the fiber-optic, state-owned Iowa Communications Network[102], while North Carolina has the North Carolina Information Highway, an all-fiber, all-digital, high-speed network that is operated as a public-private partnership.[103]

A STATE TELECOMMUNICATIONS PLAN

A telecommunications plan must be flexible and must be reviewed often, due to the improvements in telecommunications and computer technology that occur seemingly daily. It should be prepared both by those knowledgeable in the latest technical innovations and those who must use the system day after day as a practical tool. And it must balance the need of society to promote the latest telecommunications technology with the need to have that technology available to as many users as possible.

The model statute in Section 7-206.1 below describes a state telecommunications and information technology plan. The plan's focus is both upon the state government's internal communications and information technology needs and upon the regulation and development of the commercial or public telecommunications system. The optional phrasing in paragraph (1) allows a state adopting this Section to have the telecommunications and information technology plan prepared by the state department of development, the state planning agency, another state agency more closely related to telecommunications and information technology issues such as the public utilities commission, a committee of experts created for the purpose, or some combination of the above.

4-206.1 State Telecommunications and Information Technology Plan

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[100]Ga. Code Ann. §50-5-160 *et seq.* (1997).

[101]The universal services fund receives its income from fines and penalties on common carriers. Ga. Code Ann. § 50-5-163.

[102]www.icn.ia.us/

[103]www.ncih.net/nciin.html/

(1) The [state department of development, state planning agency, *or other appropriate state agency*] may prepare a state telecommunications and information technology plan.

(2) The purposes of the state telecommunications and information technology plan are to:

(a) assess short- and long-term telecommunications needs and existing telecommunications infrastructure and services in the state;

(b) assess short- and long-term telecommunications and information technology needs of the state government and all agencies thereof;

(c) assess the manner in which existing telecommunications and information technology are used by the state government or any agency thereof;

(d) encourage investment in the most advanced telecommunications and information technology while protecting the public health, safety, and general welfare;

(e) acknowledge the economic development potential of telecommunications and information technology for the state;

(f) coordinate state telecommunications and information technology initiatives with other state programs; and

(g) provide guidance to local governments in the preparation of telecommunications components of local comprehensive plans pursuant to Section [7-206.1].

(3) In preparing the state telecommunications and information technology plan, the [state department of development, state planning agency, *or other state agency*] shall undertake supporting studies that are relevant to the topical areas included in the plan. In undertaking these studies, the state may utilize studies conducted or information assembled for the preparation of the state economic development plan pursuant to Section [4-206] or state capital budget and capital improvement program pursuant to Sections [4-301 to 4-304], or may utilize studies conducted by others. The studies may concern, but shall not be limited to, the following:

(a) surveys and assessments of future telecommunications needs on a statewide basis based upon projected and desired growth and development, including opinions of public and private officials as to the appropriate role of the state in regulating and promoting telecommunications;

(b) an assessment of the existing private telecommunications system on a statewide basis, with an identification of regional differences, if any;

(c) surveys and assessments of telecommunications and information technology initiatives undertaken by other states;

(d) surveys and assessments of future telecommunication and information technology needs as they relate to both the state government as a whole and all the agencies of the state;

(e) an appraisal of the impact of telecommunications on the future location of business and industry within the state;

(f) an assessment of existing telecommunications and information technology being utilized by the state government and all agencies thereof, including an appraisal of the compatibility of the technology with presently-utilized technology and foreseeable future improvements in telecommunications and information technology; and

(g) an assessment of federal and state statutes and regulations, as well as relevant local ordinances and permitting procedures, that affect private telecommunications firms and their effects on the cost of doing business and on investment in infrastructure, technological advancement, and the provision of universal service.

(4) The state telecommunications and information technology plan shall consist of summaries of the relevant studies described in paragraph (3) above, and goals, policies, and implementing strategies by which the state and state agencies may improve telecommunications infrastructure and services in order to address the purposes listed in paragraph (2) above.

(5) The implementing strategies shall include, but shall not be limited to, new or amended state legislation, state capital investment, partnerships with private, governmental, and nonprofit organizations, and estimates of the costs of such changes, legislation, or programs. The plan shall also propose benchmarks by which changes in the state's telecommunication and information technology system can be measured over time. The implementing strategies may include proposals for:

(a) construction or installation of, or improvements to, the telecommunications facilities and information technology of the state government and state agencies;

(b) the enactment of uniform standards for state government telecommunications facilities and information technology;

(c) public information programs to market the telecommunications potential of the state for economic development purposes;

(d) proposed model goals, policies, and guidelines that local governments may include in a telecommunications component of a community facilities element prepared pursuant to Section [7-206.1];

(e) agreements between telecommunications firms and the state or state agencies for use of telecommunication facilities by public safety and emergency management services personnel in the event of disaster; and

(f) changes to statutes, regulations, and procedures affecting telecommunications, including, but not limited to, taxation, to enhance investment in telecommunications infrastructure, advance technology, and provide universal service.

(6) The [department *or* agency] shall conduct public hearings and workshops on the proposed plan as provided by Section [4-209].

(7) Subsequent to the public hearings and workshops, the [state department of development, state planning agency, *or other state agency*] shall submit the proposed plan and a summary of comments received at the hearings and workshops to the [office of the governor], which shall review the plan for consistency with the state comprehensive plan, state land development plan, [[and] state biodiversity conservation plan,] [and any other instructions and directives it may have issued]. The [office of the governor] shall consider all written comments received when formulating any required revisions. Within [30] days, the reviewed plan shall be returned to the [department *or* agency], together with any required revisions.

(8) The [state department of development, state planning agency, *or other state agency*] shall, within [30] days of the return of the state telecommunications and information technology plan, incorporate all revisions required by the governor. The plan shall then be adopted in the manner provided by Section [4-210] and certified in the manner provided by Section [4-211].

(9) The [state department of development, state planning agency, *or other state agency*] shall, on a [biennial] basis, review the state telecommunications and information technology plan with state agencies significantly affected by the provisions of the particular section under review, and may propose, in writing, amendments to the plan, accompanied by an explanation of the need for such amendments. Such changes shall be approved in the same manner as the adoption of the original plan.

Commentary: State Housing Plan

A state housing plan is particularly appropriate when there is a state agency dedicated to housing issues (e.g., a state housing finance agency or state housing department charged with identifying housing needs on a statewide basis and then allocating state resources), although it may also be

carried out by a state planning agency. California, Georgia, Oregon, and Washington are examples of states that have such plans, and the model legislation below is based on them.[104]

The state housing plan assesses existing housing conditions on a statewide basis and projects future housing needs, especially for affordable housing, in order to assure that a wide variety of housing types is available to accommodate the state's residents. The presence of an adequate supply of housing for all income groups is important to support economic development. Businesses, when they locate or expand, look to the supply of housing for potential workers and having a sufficient supply of housing in all parts of the state is a strategic advantage that favors one state over another.

The state housing plan should identify how the state intends to initiate or make changes to existing programs and may recommend measures to remove regulatory barriers to affordable housing. For example, the plan may propose programs to ensure that middle- and moderate-income workers, such as police officers, firefighters, teachers, and other vital workers are able to find housing near where they work. Additionally, the plan may recommend initiatives that assist low-income elderly people find apartments so that they may live near their children or that help moderate-income young married couples find housing in the community where they grew up. The plan may also serve as a vehicle to distribute federal funds, such as Community Development Block Grant monies, or state funds dedicated to affordable housing purposes.[105] Moreover, the plan may stimulate or inspire other government agencies, such as local governments, to address housing needs.

Housing planning is addressed in other sections of the *Legislative Guidebook*. Section 4-208, Alternative 1 (Model Balanced and Affordable Housing Act), describes a regional fair-share housing system, with the optional involvement of a regional planning agency. Chapter 6, Regional Planning, describes the contents of a regional housing plan, similar to the language below (see Section 6-203). Detailed requirements for local housing planning is also addressed in Chapter 7, Local Planning, Section 7-207.

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[104]Cal. Codes Ann., Health and Safety Code, §§50450 to 50452 (1986 and Pamp. Supp. 1995) (Statewide housing plan); Ga. Code Ann. §8-3-171 (1994) (State housing goal report); Ore. Rev. Stat. §456.572 (1993) (State housing plan); and Wa. Rev. Code. Ann. §43.185B.040 (1995 Pamp. Supp.) (Housing advisory plan).

[105]For an overview of state housing initiatives that examines the growth of state housing programs, including tax exempt financing and the delegation of federal housing subsidies, see Peter W. Salsich, Jr., "Urban Housing: A Strategic Role for the States," *Yale Law and Policy Review* 12 (1994): 93, appearing in Stuart L. Deutsch and A. Dan Tarlock, eds., *Land Use and Environment Law Review – 1995* (Deerfield, Ill: Clark Boardman Callaghan, 1995), 191. Salsich contends that "[s]tate planning programs that fully assess housing trends and needs on a broader base than local plans are critical components of an effective national housing strategy. Housing markets vary from state to state, as well as within areas of particular states. Because of the dynamics of these markets, assessments of housing needs tend to be more accurate if they are made from a perspective that is broader than a local perspective but narrower than a national one." Id., 227-228.

4-207 State Housing Plan; Housing Advisory Committee; Annual Progress Report

(1) The [state planning agency *or* state department of housing and community development *or* state department of community affairs *or* state department of development *or* state housing finance agency] shall, within [18] months of the effective date of this Act, prepare and adopt, and update and amend every [5] years, a state housing plan.

(2) The purposes of the state housing plan are to:

(a) document the needs for affordable housing[106] in the state, including special needs housing,[107]and the extent to which private- and public-sector programs are meeting those needs;

(b) encourage the provision of affordable housing, especially as it relates to the location of such housing proximate to jobsites;

(c) encourage the rehabilitation and preservation of affordable housing;

(d) identify barriers to the production of affordable housing at the state and local levels of government;

(e) develop sound strategies, programs, and other actions to address affordable housing on a statewide basis; and

(f) serve as a guide for the allocation of state resources to meet those needs.

(3) The governor [shall *or* may] appoint a housing advisory committee to the [state planning agency *or* state department of housing and community development *or* state department of community affairs *or* state department of development *or* state housing finance agency] to serve as the [agency *or* department]'s principal advisory body in the preparation of the state housing plan and on housing and housing-related issues. The [agency *or* department] shall

[106]"Affordable housing" is defined in Section 4-208.3 (Model Balanced and Affordable Housing Act) of the *Legislative Guidebook* as: "[H]ousing that has a sales price or rental amount that is within the means of a household that may occupy middle-, moderate-, low-, or very low-income housing, ... In the case of dwelling units for sale, housing that is affordable means housing in which mortgage, amortization, taxes, insurance, and condominium or association fees, if any, constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the rent and utilities constitute no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question." For definitions of other categories of housing by income group, see Section 4-208.3.

[107]The households most commonly identified as requiring "special needs" programs include the elderly, the physically and mentally disabled, single heads of households, large families, farm workers and migrant laborers, and the homeless.

provide administrative and clerical assistance and such other information and assistance as may be deemed necessary by the committee in order for committee to carry out its duties. Members of the committee shall serve without compensation, but shall be reimbursed for travel expenses [as provided by state law].

♦ Because it is important to have widespread participation by various groups affected by housing programs, the model legislation includes a housing advisory committee to advise the state agency when it is preparing the plan. Legislation based on this model may also specify the number of committee members, what interests they represent, and their terms. Typical members might include representatives of: the construction industry; home builders; home mortgage lending profession; economic development profession; real estate sales profession; apartment management and operation industry; nonprofit housing development industry; homeless shelter operators; lower-income persons; public housing authorities (both residents and those involved in public housing management); special needs populations; advocacy groups for affordable housing; and local governments in the state.

(4) The state housing plan shall at a minimum consist of the following:

(a) an evaluation of and summary statistics on housing conditions for the state[,] [all substate districts designated pursuant to [Section [6-602]],] [[and] counties] for all economic segments. The evaluation shall include the existing distribution of housing by type, size, gross rent, value, and, to the extent data are available, condition, the existing distribution of households by gross annual income and size, and the number of middle-, moderate-, and low-income households that pay more than [28] percent of their gross annual household income for owner-occupied housing and [30] percent of their gross annual household income for rental housing.

(b) a projection for each of the next [5] years of total housing needs, including needs for middle-, moderate-, and low-income and special needs housing in terms of units necessary to be built or rehabilitated for the state[,] [all substate districts designated pursuant to [Section [6-602]],] [[and] counties];

(c) a discussion of the capabilities, constraints, and degree of progress made by the public and private sectors in meeting the affordable housing needs and special housing needs of the state;

(d) an identification and comprehensive assessment of state and local regulatory barriers to affordable housing, including building, housing, zoning, subdivision and related codes, and their administration;[108]

[108]The report of the U.S. Advisory Commission on Regulatory Barriers to Affordable Housing, *"Not in My Back Yard" Removing Barriers to Affordable Housing* (Washington, D.C.: U.S.G.P.O, 1991) recommended that "each [s]tate undertake an ongoing action program of regulatory barrier removal and reform at the state and local levels." Id., at 7-6.

(e) goals for each of the next [5] years for the production of housing units, both new and rehabilitated, for middle-, moderate-, and low-income and special needs housing for the state, [all substate districts designated pursuant to [Section [6-602],][[and] counties];

(f) based on an analysis of subparagraphs (4)(a) through (4)(e) above, specific recommendations, policies, programs, and/or proposals for legislation for meeting the affordable housing needs and special housing needs of the state, including, but not limited to:

1. financing for the acquisition, rehabilitation, preservation, or construction of housing;

2. use of publicly owned land and buildings as sites for low- and moderate-income housing;

3. regulatory and administrative techniques to remove barriers to the development and placement of affordable housing and to promote the location of such housing proximate to jobsites;

4. coordination of state initiatives with federal financing programs and the development of an approved housing strategy as provided for in the Cranston-Gonzales National Affordable Housing Act (Section 12701 *et seq.* of Title 42, United States Code), as amended, including a summary table of anticipated funding from each federal program and any state, local, or other resources available to meet matching requirements;

5. stimulation of public and private sector cooperation in the development of affordable housing and the creation of incentives for the private sector to construct or rehabilitate affordable housing;

6. tax, infrastructure financing, and land-use policies and laws; and

7. local opportunities for public housing resident management and ownership.

♦ It may also be desirable for the contents of the state housing plan to include proposed annual allocations of monies from state housing trust funds for affordable housing.[109] Such funds may include proceeds from the sale of mortgage revenue bonds, title transfer taxes, mortgage recordation fees, abandoned or unclaimed funds, lottery proceeds, and other revenues.

[109]See generally David Rosen, *Housing Trust Funds*, Planning Advisory Service Report No. 406 (Chicago: American Planning Association, December 1987).

Removing Regulatory Barriers to Affordable Housing

The U.S. Advisory Commission on Regulatory Barriers to Affordable Housing, in 1991, recommended that states initiate actions to promote or encourage certain types of affordable housing options. These measures included amending state zoning enabling acts to: (1) authorize, under appropriate conditions and standards, manufactured housing as a permitted dwelling units under local zoning and prohibit local communities from enacting ordinances forbidding manufactured housing; (2) direct that localities permit, under state standards, accessory apartments as of right (e.g., not as a "conditional use") in any single-family residential zone in their jurisdiction subject to appropriate design, density, and occupancy standards set forth by the state; and (3) require localities to include a range of residential use categories that permit, as of right, duplex, two-family, and triplex housing and adequate land within their jurisdiction for such uses. The Commission also strongly recommended that states require all local governments to review and modify their housing and building codes and zoning ordinances to permit, under reasonable state-established design, health, density, and safety standards, single-room-occupancy housing. Another Commission recommendation urged state and local governments to develop and implement necessary policy and funding plans to provide and maintain adequate infrastructure in support of affordable housing and growth and to ensure that infrastructure is available in a timely fashion.

SOURCE: U.S. Advisory Commission on Regulatory Barriers to Affordable Housing, *"Not in My Back Yard" Removing Barriers to Affordable Housing* (Washington, D.C.: U.S. GPO, 1991), 7-12 to 7-13.

Typically, housing trust fund monies are used for grants, loans, loan guarantees, and loan subsidies. They may be made available to local governments, local housing authorities, private lenders, and private and nonprofit developers. Because the nature of housing trust funds is unique to each state, statutory language providing for the annual allocations has not been proposed here.

(5) The [agency *or* department] shall conduct workshops and public hearings on the state housing plan as provided by Section [4-209]. The [agency *or* department] shall seek the advice of the housing advisory committee in assessing comments received at the hearings and workshops.

(6) Subsequent to the workshops and public hearings, the [agency *or* department] shall submit the plan and a summary of comments received at the workshops and hearings to the [office of the governor], which shall review the plan for consistency with the state comprehensive plan, the state land development plan, [[and] the state biodiversity conservation plan,] [and any other instructions and directives it may have issued]. The [office of the governor] shall

consider all written comments received when formulating any required revisions. Within [30] days, the reviewed plan shall be returned to the [agency *or* department], together with any required revisions.

(7) The [agency *or* department] shall, within [30] days of the return of the state housing plan, incorporate all revisions required by the governor. The plan shall then be adopted in the manner provided by Section [4-210] and certified in the manner provided by Section [4-211].

(8) Each [*date*], for the year beginning [*date*], the [agency *or* department] shall submit an annual progress report to the governor and legislature describing measures taken to implement the state housing plan during the previous year, detailing the extent to which the state's affordable housing needs were met during the previous year, and containing other recommendations for meeting those needs.

Commentary: State Planning For Affordable Housing (Two Alternatives)

Over the past quarter century, a number of states have adopted statutes and formulated planning approaches to ensure the availability of affordable housing.[110] In contrast to enabling legislation that simply permits and describes local housing planning, these statutes proactively attempt to remove barriers to affordable housing by placing an affirmative responsibility on local governments. These states have defined the provision of such housing as a state interest, beyond mere encouragement, and supervise the housing planning process at the regional and local levels.

This type of legislation generally falls into three general categories: (1) a "bottom-up" approach in which the preparation of housing plans is a collaborative effort between a regional planning agency and member local governments under state supervision; (2) a "top-down" approach in which the state establishes housing goals for individual local governments based on regional needs projections; and (3) an appeals approach based on the existence of a state-level appeals process that provides for an override, either by a court or an administrative body, of local decisions that reject

[110]For an excellent review of these statutes and programs, see Robert Burchell, David Listokin, and Arlene Pashman, *Regional Housing Opportunities for Lower Income Households: An Analysis of Affordable Housing and Regional Mobility Strategies*, prepared for the U.S. Department of Housing and Urban Development (New Brunswick, N.J.: Center for Urban Policy Research, March 1, 1994)) (discussing regionally and locally-initiated programs as well as those administered by states); John Charles Bogen, "Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction," *N.C. L. Rev*. 7 (1993), 1573, 1590-1601 (discussing California, New Jersey, Connecticut, Massachusetts, and Oregon); Peter Salsich, Jr., "Urban Housing: A Strategic Role for the States," *Yale Law and Policy Review* 12 (1994): 94, reprinted in *Land Use and Environment Law Review 1995*, Stuart L. Deutsch and A. Dan Tarlock, eds (Deerfield, Il.: Clark Boardman Callaghan, 1995), 191, 203-209. Professor Salsich notes that "at least seventeen states have enacted legislation encouraging or requiring local governments to engage in formal land use planning that includes affordable housing development as an essential element." Id., 203. Salsich provides, at 203, n. 58, a complete list of state planning statutes that require or encourage local housing elements. Local housing planning is addressed in Chapter 7, Local Planning, of the *Legislative Guidebook*.

proposals for affordable housing or that otherwise make their construction uneconomic or infeasible. These three approaches are described more completely in the Note located at the end of this Chapter. The two model statutes that follow are examples of a hybrid "bottom-up/top-down" approach and an appeals approach.

The first model statute is based on statutes from New Jersey and California and a proposal from the U.S. Advisory Commission on Intergovernmental Relations. It establishes a state-level Balanced and Affordable Housing Council to administer, and enforce if necessary, a statewide regional fair-share allocation system for affordable housing. The primary goal of the model statute is to ensure that a wide variety of housing types will be available to accommodate low- and moderate-income households on a regional fair-share basis. Therefore, while the model calls for housing planning for all income groups, its focus is primarily on local efforts to permit and otherwise encourage low- and moderate-income housing. Balancing employment and residential housing opportunities is critical to the state because it lessens traffic congestion, contributes to an improved environment, reduces infrastructure demand, and makes the state more competitive to new and expanded businesses. In addition, the model strives to assure an adequate supply of housing in appropriate locations for persons of all income strata, including teachers, police officers, bank and grocery clerks, waiters and waitresses, and others in middle-, moderate-, and low-wage jobs that are an integral part of the economy.

Two organizational alternatives are provided. Under the first, the Council is responsible for designating housing regions for the state, preparing estimates of present and prospective need for low- and moderate-income housing by region, developing regional fair-share allocations of such needs to local government, and reviewing and approving housing elements of comprehensive plans submitted by local governments.

Under the second alternative, which involves a role for regional planning agencies, the Council also designates housing regions and prepares estimates of present and prospective need. However, the actual allocation of the regional need figures is accomplished by regional planning agencies, using guidelines, data, and suggested methodologies supplied by the Council. When the regional planning agency prepares the regional fair-share allocations, the result is termed a "regional fair-share allocation plan" that is subsequently reviewed and approved by the Council. The allocation plan may be part of the agency's broader regional comprehensive plan. After a regional planning agency's regional allocation plan is approved by the Council, the agency may then review and approve housing elements submitted by local governments.

The housing element itself is intended to provide the local government with an analysis of existing and prospective housing needs in the region and set forth implementing measures for the preservation, improvement, and development of housing. In it, the local government identifies how it will address the housing needs for all income groups, especially its regional fair share, and what specific affirmative steps it is going to take, including changes in development regulations to eliminate unnecessary cost generating requirements that can affect the cost of all housing.

The model statute also provides for a mediation process overseen by the Council or the regional planning agency regarding objections to housing elements submitted by local governments for review and approval. Also, under both alternatives, the Council functions as a state-level housing

appeals board when: (a) a local government does not submit a housing element; (b) when it submits, but does not ultimately obtain approval of a housing element; or (c) when it fails to update the housing element. In the absence of an approved or updated housing element, an applicant seeking approval to build an inclusionary development (which is defined as one with at least 20 percent low- and moderate-income dwelling units) has the right to appeal any denial or approval with conditions by the local government to the Council. The Council, after a hearing on the appeal, may affirm, modify with conditions, or set aside the local government's decision. Thus, the model legislation creates a statutory – as opposed to state constitutional – remedy and incentive for local governments to adopt housing elements and carry out specific proposals contained in them.

While the model statute below draws from the New Jersey Fair Housing Act, it does not incorporate one feature of that state's legislation: a device called the "regional contribution agreement" whereby a certain percentage of low- and moderate-income units can be transferred to a receiving local government upon the payment of fees. Under the New Jersey statute, up to 50 percent of a local government's low- and moderate-income obligation can be transferred to a designated receiving local government in the same housing region by means of a regional contribution agreement and upon payment by the sending local government of a per unit amount established by the state.[111] The contribution agreement has been criticized on the grounds that it allows suburban jurisdictions to partially buy their way out of their regional fair-share obligation, thereby defeating one of the purposes of the statute.[112] On the other hand, it has been commended

[111]See N.J.S.A. §52:27D-312 (regional contribution agreements) and N.J.A.C. §5:93-6 (regional contribution agreements). The current amount, as of 1995, is at least $20,000 per unit. N.J.A.C. §5:93-6.4(b). A model regional contribution agreement appears in 5 N.J.A.C., Ch. 93, App. H.

California planning statutes contain a variant on the regional contribution agreement. They authorize a city or county to transfer a percentage of its share of the regional housing needs to another city or county under certain circumstances. These include in part: (1) that the receiving and transferring city and/or county have adopted a housing element in substantial compliance with statutory requirements; (2) that the transfer does not occur more than once in a five-year housing element interval; (3) that, before a city or county may transfer a share of its regional housing needs, it must first have met, in the current or previous housing element cycle, at least 15 percent of its existing share of the region's affordable housing needs in the very low and lower-income category of income groups defined in the statute, but that in no event shall a city or county transfer more than 500 dwelling units in a housing element cycle; and (4) that the transfer shall only be between jurisdictions that are contiguously situated or between a receiving city or county that is within 10 miles of the territory of the community of the donor city or county. The statutes require adoption of certain findings by the transferring and receiving city and/or county, which are reviewed by the council of governments in the housing region or the California Department of Housing and Community Development. The California Attorney General has the authority to enforce the transfer of regional need agreement between the two local governments. Cal. Gov't. Code §65584.5.(a). For a discussion of the California regional fair-share housing planning system, see the Note on State Planning Approaches to Promote Affordable Housing at the end of this Chapter.

[112]See Charles M. Haar, *Suburbs under Siege: Race, Space, and Audacious Judges* (Princeton, N.J.: Princeton University, 1996), 114-115; see also Rachel Fox, "Selling Out of *Mt. Laurel*: Regional Contribution Agreements in New Jersey's Fair Housing Act," *Fordham Urb. L.J.* 16 (1988): 535; Harold A. McDougall, "Regional Contribution Agreements: Compensation for Exclusionary Zoning," *Temple L.Q.* 60 (1987): 665; John Charles Boger, "Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction," *N.C. L. Rev.* 71 (1993): 1571, 1595,

as a means of allowing suburban subsidies of inner-city housing since it permits affluent portions of the state to contribute money to low-income housing, which otherwise would likely not occur.

The contribution agreement may also be a measure that makes the enactment of a fair-share statute politically more acceptable by suburban communities. Should a contribution agreement provision be included in a statute, contributions should only be accepted by those communities that have low- and moderate-wage jobs in reasonable proximity to housing opportunities. At the same time, receiving communities should not accept contributions if they will result in an undue concentration of low- and moderate-income housing.

The model statute contemplates a full-scale involvement of state, regional, and local government efforts to promote a variety and choice of affordable housing. As an option, however, "simpler" alternatives could be assembled from the components of this model that would only involve regional and local governments, and even local governments alone. For instance, a regional and local model that is based on optional (as opposed to mandated) participation and does not include an enforcement function might only incorporate elements of Sections 4-208.1, .2, .3, .6 (Alternative 1B, excluding the Balanced and Affordable Housing Council, but with the regional planning agency assuming the Council's duties), .8 (ditto), .9, .10, .11, .12, .13, .14, .15, .21, .22, .23, and .24. Similarly, a community that wished to adopt a fair-share ordinance that describes the local government's commitment to plan for low- and moderate-income housing, remove impediments to it, and provide for controls on the resale and re-rental of low- and moderate-income dwelling units, might adapt the following provisions: Sections 4-208.1, .2., .3, .9, .21., .22, .23, and .24.[113]

The second model statute pertains to affordable housing appeals. The statute authorizes a state-level procedure through which denials or conditional approvals of low- and moderate-income housing developments by local government may be appealed by applicants. A special housing appeals board or court, in a *de novo* review, may affirm, revise, or modify the conditions of, or add conditions to, decisions made by the local government regarding such developments.

The model statute also allows use of the appeals procedures by an applicant for a development that will be principally devoted to nonresidential uses in a nonresidential zoning district where the applicant proposes that no less that 20 percent of the area of the development or 20 percent of the square footage is to be devoted to low- and moderate-income housing. The statute exempts from its provisions certain categories of local government that have concentrations of lower income households or low- and moderate-income dwelling units or substandard dwellings or which have experienced construction of a certain number of affordable units over a certain time period under the statute.

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n. 101.

[113]Local efforts to plan for housing, including affordable housing, are also addressed in Chapter 7, Local Planning, of the *Legislative Guidebook,* Section 7-207, Housing Element..

4-208 State Planning for Affordable Housing (Two Alternatives)

Alternative 1 – A Model Balanced and Affordable Housing Act[114]

4-208.1 Findings and Purposes

The [legislature] finds and declares as follows:

(1) The primary goal of this Act is to assure the availability of a wide variety of housing types that will cover all income strata and accommodate a diverse population, including growing families, senior citizens, persons and households with special needs, single householders, and families whose children are of adult age and have left the household, with special emphasis and high priority on the provision of low- and moderate-income housing on a regional fair-share basis.

(2) The attainment of this goal of providing a regional fair share of the need for balanced and low- and moderate-income housing is of vital statewide importance and should be given highest priority by local governments. It requires the participation of state, regional, and local governments as well as the private sector, and the coordinated effort of all levels of government in an attempt to expand the variety of affordable housing opportunities at appropriate locations.

(3) Balance in employment and residential land use patterns should reduce traffic congestion, contribute to an improved environment through the reduction in vehicle-related emissions, and ensure that workers in this state will have available to them the opportunity to reside close to their jobsites, making the state more competitive and attractive as a location for new or expanded businesses.

(4) Balanced housing and employment opportunities at appropriate locations should result in reducing the isolation of lower income groups in a community or region, improving the safety and livability of neighborhoods, and increasing access to quality public and private facilities and services.

(5) State, regional, and local governments have a responsibility to use the powers vested in them to facilitate the improvement and development of a balanced housing stock that will be

[114]This model was drafted by Peter A. Buchsbaum, a partner in the law firm of Greenbaum, Rowe, Smith, Ravin, and Davis, in Woodbridge, New Jersey, Harvey S. Moskowitz, AICP/PP, a partner in the professional planning consulting firm of Moskowitz, Heyer, and Gruel, in Florham Park, New Jersey, and Stuart Meck, AICP/PP, Principal Investigator, and Michelle J. Zimet, AICP, attorney and Senior Research Fellow, both of the Growing Smart[SM] project.

affordable to all income levels, especially middle-, moderate-, and low-income households, and meet the needs of a diverse population.

(6) The [legislature] recognizes that in carrying out this responsibility, each local government must also consider economic, environmental, and fiscal factors and community goals set forth in its local comprehensive plan and must cooperate with other local governments and state and regional agencies in addressing the regional housing needs for middle-, moderate-, and low-income households.

4-208.2 Intent

It is the [legislature's] intent to:

(1) ensure that local governments recognize their responsibilities in contributing to the attainment of the state's fair-share housing goal identified in Section [4-208.1] of this Act and that they endeavor to create a realistic opportunity to achieve this goal;

(2) ensure that local governments prepare and affirmatively implement housing elements in their comprehensive plans, which, along with federal and state programs, will realize the attainment of the state's fair-share housing goal identified in Section [4-208.1] of this Act;

(3) recognize that local governments may be best capable of determining which specific efforts will most likely contribute to the attainment of the state's fair-share housing goal identified in Section [4-208.1] of this Act;

(4) ensure that each local government cooperates with other local and regional governments in order to address the regional housing needs of middle-, moderate-, and low-income persons;

(5) assist local governments in developing suitable mechanisms and programs to promote and develop a variety of middle-, moderate-, and low-income housing types;

(6) provide a mechanism whereby low- and moderate-income housing needs may be equitably determined on a regional basis and a fair share of such regional needs may be allocated to local governments by a state administrative agency [and by regional planning agencies];

(7) encourage state agencies to reward performance by creating linkages between grant-in-aid programs and the provision of opportunities for low- and moderate-income housing by local governments;

(8) implement programs that will encourage home ownership over a wide range of income levels, especially by middle-, moderate-, and low-income persons;

(9) provide for a state administrative agency to review and approve local housing elements and provide state funding, when available, on a priority basis to those local governments with approved elements; and

[*or*]

(9) provide for [regional planning agencies] to review and approve local housing elements under the general supervision of a state administrative agency which will provide state funding, when available, on a priority basis to those local governments with approved elements; and

(10) provide for a state administrative agency to prepare substantive and procedural rules to assist and guide [regional planning agencies and] local governments in carrying out this Act.

4-208.3 Definitions

As used in this Act:

(1) "**Act**" means the Balanced and Affordable Housing Act of _____.

(2) "**Affordable Housing**" means housing that has a sales price or rental amount that is within the means of a household that may occupy middle-, moderate-, low-, or very low-income housing, as defined by paragraphs (13), (14), (15), and (21), below. In the case of dwelling units for sale, housing that is affordable means housing in which mortgage, amortization, taxes, insurance, and condominium or association fees, if any, constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the rent and utilities constitute no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question.

♦ Percentages of gross annual household income, shown in brackets, are for 1995 and were derived from the New Jersey Administrative Code, §5:93-7.4 (1995), for the New Jersey Council on Affordable Housing. These percentages may vary by region of the country or may be influenced by current requirements of various mortgage financing programs, such as those administered by the Federal Housing Administration (FHA), the Federal National Mortgage Association (FNMA), or the Federal Home Loan Mortgage Corporation (FHLMC). Consequently, it may be necessary to modify or update these percentages.

♦ It is the intention that the term "affordable housing" be construed throughout this Act to be synonymous with the term "middle-, moderate-, and low-income housing" and they are used interchangeably throughout this model. By contrast, when the term "low- and moderate-income housing" is used, the intent is to specifically exclude middle-income housing.

(3) "**Authority**" means the entity designated by the local government for the purpose of monitoring the occupancy, resale, and rental restrictions of low- and moderate-income dwelling units.

(4) "**Balanced**" means a recognition of, as well as an obligation to address, the need to provide a variety and choice of housing throughout the region, including middle-, moderate-, and low-income housing.

(5) "**Council**" means the Balanced and Affordable Housing Council established by this Act which shall have primary jurisdiction for the administration and implementation of this Act.

(6) "**Density**" means the result of:

(a) dividing the total number of dwelling units existing on a housing site by the net area in acres; or

(b) multiplying the net area in acres times 43,560 square feet per acre and then dividing the product by the required minimum number of square feet per dwelling unit.

The result is expressed as dwelling units per net acre.

(7) "**Development**" means any building, construction, renovation, mining, extraction, dredging, filling, excavation, or drilling activity or operation; any material change in the use or appearance of any structure or in the land itself; the division of land into parcels; any change in the intensity or use of land, such as an increase in the number of dwelling units in a structure or a change to a commercial or industrial use from a less intensive use; any activity which alters a shore, beach, seacoast, river, stream, lake, pond, canal, marsh, dune area, woodland, wetland, endangered species habitat, aquifer, or other resource area, including coastal construction or other activity.

(8) "**Household**" means the person or persons occupying a dwelling unit.

(9) "**Housing Element**" means that portion of a local government's comprehensive plan, as identified in Section [4-208.9] of this Act, designed to meet the local government's fair share of a region's low- and moderate-income housing needs and analyze the local government's overall needs for affordable housing.

(10) "**Housing Region**" means that geographic area determined by the Council that exhibits significant social, economic, and income similarities, and which constitutes to the greatest extent practicable, the applicable primary metropolitan statistical area as last defined and delineated by the United States Census Bureau.

[*or*]

(10) "**Housing Region**" means a substate district that was previously designated by the governor pursuant to [Sections 6-601 to 6-602, *or cite to other section of state statutes providing for substate districting delineation*].

(11) "**Inclusionary Development**" means a development containing [at least 20 percent] low- and moderate-income dwelling units. This term includes, but is not necessarily limited to, the creation of new low- and moderate-income dwelling units through new construction, the conversion of a nonresidential structure to a residential structure, and/or the gut rehabilitation of a vacant residential structure.

(12) "**Local Government**" means a county, municipality, village, town, township, borough, city, or other general purpose political subdivision [*other than a council of governments, regional planning commission, or other regional political subdivision*].

(13) "**Low-Income Housing**" means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that does not exceed 50 percent of the median gross household income for households of the same size within the housing region in which the housing is located. For purposes of this Act, the term "low-income housing" shall include "very low-income housing."[115]

(14) "**Middle-Income Housing**" means housing that is affordable for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than [80] percent but does not exceed [*specify a number within a range of* 95 *to* 120] percent of the median gross household income for households of the same size within the housing region in which the housing is located.

♦ While the definitions of low-income and moderate-income housing are specific legal terms based on federal legislation and regulations, this term is intended to signify in a more general manner housing that is affordable to the great mass of working Americans. Therefore, the percentage may be amended by adopting legislatures to fit the state's circumstances.

(15) "**Moderate-Income Housing**" means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 50 percent but does not exceed 80 percent of the median gross household income for households of the same size within the housing region in which the housing is located.

(16) "**Net Area**" means the total area of a site for residential or nonresidential development, excluding street rights of way and other publicly dedicated improvements such as parks, open space, and stormwater detention and retention facilities. "Net area" is expressed in either acres or square feet.

[115]For sources of definitions for low-, moderate- and very low-income households, see 24 CFR §91.5 (Definitions) and 5 N.J.A.C. §5:93-1.3.

(17) "**Petition For Approval**" means that petition which a local government files which engages the [Balanced and Affordable Housing Council *or* regional planning agency] approval process for a housing element.

(18) "**Regional Planning Agency**" means a [*council of governments, regional planning commission, or other regional political subdivision*] with the authority to prepare and adopt a regional comprehensive plan.

(19) "**Regional Fair Share**" means that part of a region's low- and moderate-income housing units that is allocated to a local government by [the Balanced and Affordable Housing Council *or* a regional planning agency].

[(20) "**Regional Fair-Share Allocation Plan**" means the plan for allocating the present and prospective need for low- and moderate-income housing to local governments in a housing region that is prepared by a [regional planning agency] using regional need figures provided by the Balanced and Affordable Housing Council.[116]]

(21) "**Unnecessary Cost Generating Requirements**" mean those development standards that may be eliminated or reduced that are not essential to protect the public health, safety, or welfare or that are not critical to the protection or preservation of the environment, and that may otherwise make a project economically infeasible. An unnecessary cost generating requirement may include, but shall not be limited to, excessive standards or requirements for: minimum lot size, building size, building setbacks, spacing between buildings, impervious surfaces, open space, landscaping, buffering, reforestation, road width, pavements, parking, sidewalks, paved paths, culverts and stormwater drainage, oversized water and sewer lines to accommodate future development without reimbursement, and such other requirements as the Balanced and Affordable Housing Council may identify by rule.

(22) "**Very Low-Income Housing**" means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income equal to 30 percent or less of the median gross household income for households of the same size within the housing region in which the housing is located.

♦ Additional definitions may be needed as the Council develops procedures and programs to implement this statute. Some definitions may be incorporated into the Council's rules, thereby avoiding the need to amend the statute.

4-208.4 Creation and Composition of Balanced and Affordable Housing Council

[116]See Section 6-201(5)(e), Alternative 2, of the *Legislative Guidebook,* which describes the components of a regional comprehensive plan, including a regional fair-share housing allocation plan. The definition of a regional fair-share allocation plan would only need to be included if the approach selected gives the responsibility of preparing the regional fair-share allocations to a regional planning agency.

(1) There is hereby established a Balanced and Affordable Housing Council.

(2) The Council shall consist of [15] members to be appointed by the governor. The members shall consist of the following:

[(a) The commissioner or director of the Department of Housing and Community Development [*or similar state agency*];]

[(b) The director of the State Housing Finance Agency;]

[(c) [3] members of a municipal legislative body [*or other elected chief officials of local governments, other than counties*];]

[(d) [3] elected chief county executives or legislators;]

[(e) [1] resident of low- or moderate-income housing or citizen designated as an advocate for low- or moderate-income persons;]

[(f) [4] citizens representing the various geographic areas of the state; and]

[(g) [2] representatives of professional and service organizations who are active in providing balanced and affordable housing, including, but not limited to, home building, nonresidential development, banking, construction, labor, and real estate.]

♦ A key to a successful balanced and affordable housing council is broad representation by both local officials and persons knowledgeable about building and managing middle-, moderate-, and low-income housing. While this model has the governor making all of the appointments to the Council, in some states, appointments could instead be made by the senate president and speaker of the house. Other designated appointments could include representatives of the state home builders association and/or a state chapter of the American Planning Association. While language has not been provided here, the Act may also indicate whether members should have term limits and how they may be removed.

4-208.5 Organization of the Council

(1) The Council shall elect its own chair and may create and fill such offices as it determines to be necessary. The Council may create and appoint advisory committees whose membership may consist of individuals whose experience, training, and/or interest in a program, activity, or plan may qualify them to lend valuable assistance to the Council. Members of such advisory bodies shall receive no compensation for their services but may be reimbursed for actual expenses expended in the performance of their duties.

(2) The Council shall meet at least [4] times each year.

(3) All actions of such advisory committees shall be reported in writing to the Council no later than the next meeting or within [30] days from the date of the action, whichever is earlier. The Council may provide a procedure to ratify committee actions by a vote of the members of the Council.

Alternative 1A – Strong Council with No Regional Planning Agency Involvement

4-208.6 Functions and Duties of the Council.

(1) The Council shall have the authority and duty to:

(a) determine, in consultation with affected agencies, and revise as necessary, housing regions for the state;

(b) estimate and revise at least once every [5] years the present and prospective need for low- and moderate-income housing for each housing region in the state;

(c) determine the regional fair share of the present and prospective need for low- and moderate-income housing for each local government in each housing region and revise the allocation of the need for each housing region in the state at least once every [5] years;

(d) review and approve housing elements submitted by local governments;

(e) establish a mediation process by which objectors to a local government's housing element may seek redress;

(f) hear and decide appeals on denials or conditional approvals from applicants seeking approval from a local government to construct an inclusionary housing project;

(g) adopt rules and issue orders concerning any matter within its jurisdiction to carry out the purposes of this Act pursuant to [*the state administrative procedures act*]; and

(h) prepare a biennial report to the governor and state legislature that describes progress in promoting affordable housing in the housing regions of the state.

(2) The Council may advise state agencies on criteria and procedures by which to reward local governments through the discretionary distribution of grants of state aid when their housing elements are approved pursuant to this Act.[117]

[117]For an example of a state-level policy that links the award of discretionary state funds with local government housing policies, see Commonwealth of Massachusetts, Executive Order No. 215, "Disbursement of State Development Assistance" (March 15, 1982).

(3) The Council shall also take such other actions as may be necessary to carry out the purposes of this Act, including coordination with other federal, state, and local agencies.

♦ Alternative 1A is appropriate in those states with either a weak (or nonexistent) county government and/or a weak (or nonexistent) regional planning organization. By contrast, in states that have strong county governments or strong regional councils of government, a regional planning agency can work in tandem with the Council in preparing the regional fair-share allocations and in reviewing and certifying local housing elements. These are discussed below.

Alternative 1B – Council and Regional Planning Agency Work in Tandem

4-208.6 Functions and Duties of the Council and [Regional Planning Agencies]

(1) The Council shall have the authority and duty to:

(a) determine, in consultation with [regional planning agencies and other affected agencies], housing regions for the state, and revise such regions as necessary;

(b) estimate the present and prospective need for low- and moderate-income housing for each housing region in the state at least once every [5] years;

(c) review and approve regional fair-share allocation plans prepared by [regional planning agencies];

(d) hear and decide appeals on denials or conditional approvals from applicants seeking approval from a local government to construct an inclusionary housing project;

(e) hear and decide appeals of determinations by [regional planning agencies] pursuant to this Act and the Council's rules;

(f) adopt rules and issue orders concerning any matter within its jurisdiction to carry out the purposes of this Act pursuant to [*the state administrative procedures act*];[118]

(g) administer grants-in-aid to [regional planning agencies] to carry out their duties under this Act;

(h) prepare a biennial report to the governor and state legislature that describes progress in promoting affordable housing in the housing regions of the state;

[118]For an example of language granting authority to a state planning agency to issue rules and orders, see Section 4-103 of the *Legislative Guidebook*.

(i) advise state agencies on criteria and procedures by which to reward local governments through the discretionary distribution of grants of state aid when their housing elements are approved pursuant to this Act; and

(j) take such other actions as may be necessary to carry out the purposes of this Act, including coordination with other federal, state, and local agencies.

(2) [Regional planning agencies] shall have the authority to:

(a) prepare and submit to the Council at least once every [5] years a regional fair-share allocation plan in accordance with Section [4-208.8] of this Act;

(b) review and approve all local government housing elements that meet the requirements of this Act and the rules of the Council;

(c) provide for a mediation process by which objectors to a local government's housing element may seek redress, subject to the rules of the Council;

(d) provide technical assistance to local governments in the region in the development and implementation of local housing elements;

(e) administer federal and state grant-in-aid programs to carry out the purposes of this Act; and

(f) take such other actions as may be necessary to carry out the purposes of this Act.

4-208.7 Appointment of Council Executive Director; Hire by Contracts; Purchases and Leases; Maintenance of Public Records

(1) The Council shall appoint an executive director who shall select, hire, evaluate, discipline, and terminate employees pursuant to rules adopted by the Council. The executive director shall also be responsible for the day-to-day work of the Council, and shall manage and supervise employees and consultants hired by contract, except for attorneys retained to provide independent legal counsel and certified public accountants retained to conduct independent audits. The executive director shall serve at the pleasure of the Council.

(2) The Council may hire by contract mediators and consultants for part-time or full-time service as may be necessary to fulfill its responsibilities.

(3) The Council may purchase, lease, or otherwise provide for supplies, materials, equipment, and facilities as it deems necessary and appropriate in the manner provided for in rules adopted by the Council.

(4) The Council shall keep a record of its resolutions, minutes of meetings, transactions, findings, and determinations, which record shall be public record.

♦ As an alternative, a Council may use the rule-making and contract authority provided for by the state's administrative procedures act or procurement laws.

Alternative 1A – Action by Council

4-208.8 Council Designation of Housing Regions; Determination of Present and Prospective Housing Need; Regional Fair-Share Allocations; Adoption of Need Estimates and Allocations

(1) The Council shall, within [18] months of the effective date of this Act, designate housing regions for the state, prepare estimates of present and prospective housing needs for low- and moderate-income dwelling units for each region for the next [5] years, and prepare regional fair-share allocations of those dwelling units to local governments in each region. The Council may, from time to time, revise the boundaries of the housing regions and shall revise the estimates and allocations at least once every [5] years hereafter. Revisions to the boundaries, estimates, and allocations shall be effected in the same manner as the original adoption.

(2) In developing the regional estimates, the Council shall consider the availability of public and private financing for housing and the relevant housing market conditions, shall use the most recent data and population statistics published by the United States Bureau of the Census, and shall give appropriate weight to pertinent research studies and reports by government agencies. The Council may utilize the assistance of the [state planning agency *or similar state agency*] in obtaining demographic, economic, housing, and such other data and in developing population, employment, and other relevant estimates and projections.[119]

(3) In calculating each local government's regional fair share, the Council shall consider, but shall not be limited to, the following factors:[120]

[(a) the number of vacant, overcrowded, or substandard housing units;

[119]For an example of housing need projections, see 5 N.J.A.C., Ch. 93, App. A (Methodology); see also David Listokin, *Fair Share Housing Allocation* (New Brunswick, N.J.: Center for Urban Policy Research, 1976), 48-51.

[120]These factors are only intended to be illustrative. Compare Cal. Gov't. Code, §65584(a) (Regional housing needs), where the factors are included in the statute, with N.J.S.A. §52:27D-307(c)(2) (discussion of adjustment of present and prospective regional fair share). The allocation formulas must be tailored to each state. For an example of an allocation formula that is the result of rule making by a state agency, see N.J.A.C. §5:93-2.1 *et seq.* (Municipal determination of present and prospective Need) and Appendix A. See also David Listokin, *Fair Share Housing Allocation* (New Brunswick, N.J.: Center for Urban Policy Research, 1976) for an early survey of allocation formulas.

(b) the number of acres of:

1. vacant residential land;

2. residential land suitable for redevelopment or increased density of development; and

3. nonresidential land suitable, with respect to surrounding or neighboring uses, for residential use;

in each local government presently sewered or expected to be sewered in the next [5] years;

(c) commuting patterns within each housing region;

(d) employment opportunities within each housing region, including the growth and location of moderate- and low-wage jobs;[121]

(e) the current per capita fiscal resources of each local government, defined by the total [nonresidential] real estate valuation of the local government, plus the total of all personal income, divided by current population;

(f) the relationship of each local government's median household income to the median household income of the region;

(g) the existing concentrations of low- and moderate-income households in each housing region;[122]

(h) the location of urban growth area(s) in an adopted regional comprehensive plan; and[123]

(i) the existence of an area of critical state concern[124] and any restrictions on development placed on it.]

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[121]Projecting the growth and location of moderate- and low-wage jobs is an important factor in assessing the need and approximate location for low- and moderate-income housing.

[122]It is important that an allocation strategy and a local housing element seek spatial dispersion of low- and moderate-income housing opportunities since they should not add to the concentration of the poor.

[123]See Section 6-201, Preparation of Regional Comprehensive Plan, Alternative 2, of the *Legislative Guidebook* for a treatment of urban growth area designation.

[124]See Section 5-201 *et seq*. of the *Legislative Guidebook*, which addresses areas of critical state concern.

(4) The Council shall adopt by rule, either individually or joined in one or more proceedings, designations for housing regions in the state, the estimates of present and prospective housing needs for low- and moderate-income dwelling units for each region for the next [5] years, and the regional fair-share allocations of those units to local governments in each region. At least [30] days prior to adoption, the Council shall transmit a copy of the proposed housing regions, as well as the estimates and allocations, to the legislative body of each local government in the state. Any interested party may submit written comments or may present oral testimony to the Council on the proposed rule. Such comments and testimony shall be incorporated into the hearing record. A copy of the adopted rule shall be transmitted by the Council to each local government's legislative body, to persons requesting a copy, and to the [state planning agency *or similar state agency*].

Alternative 1B – Action by Council and Regional Planning Agency

4-208.8 Council Designation of Housing Regions; Preparation of Estimates of Present and Prospective Housing Need; Preparation of Regional Fair-Share Allocation Plan by [Regional Planning Agency]; Adoption of Plan; Review and Approval of Plan by Council

(1) The Council shall, within [12] months of the effective date of this Act, designate housing regions for the state and prepare estimates of present and prospective housing needs for low- and moderate-income dwelling units for each housing region for the next [5] years. The Council may, from time to time, revise the boundaries of the housing regions and shall revise the estimates at least once every [5] years hereafter. Revisions to the boundaries and the estimates shall be effected in the same manner as the original adoption.

(2) In developing the regional estimates, the Council shall consider the availability of public and private financing for housing and the relevant housing market conditions, shall use the most recent data and population statistics published by the United States Bureau of the Census, and shall give appropriate weight to pertinent research studies and reports by government agencies. The Council may utilize the assistance of the [state planning agency *or similar state agency*] in obtaining demographic, economic, housing, and such other data and in developing population, employment, and other relevant estimates and projections.

(3) The Council shall adopt by rule, either individually or joined in one or more proceedings, the designations for housing regions for the state and the estimates of present and prospective housing needs for low- and moderate-income dwelling units for each region for the next [5] years. At least [30] days prior to adoption, the Council shall transmit a copy of the proposed housing regions and the estimates to each [regional planning agency] and the legislative body of each local government in the state. Any interested party may submit written comments or may present oral testimony to the Council on the proposed rule. Such comments and testimony shall be incorporated into the hearing record. The Council shall transmit a copy of the adopted rule to each local government's legislative body, to persons requesting a copy, and to the [state planning agency *or similar state agency*].

(4) The Council shall, within [12] months of the effective date of this Act, provide guidelines, data, and suggested methodologies to each [regional planning agency] in the state in order that each agency may prepare a regional fair-share allocation plan. In developing the guidelines, data, and suggested methodologies, the Council shall consider, but shall not be limited to, the following factors:

[(a) the number of vacant, overcrowded, or substandard housing units;

(b) the number of acres of:

1. vacant residential land;

2. residential land suitable for redevelopment or increased density of development; and

3. nonresidential land suitable, with respect to surrounding or neighboring uses, for residential use;

in each local government presently sewered or expected to be sewered in the next [5] years;

(c) commuting patterns within each housing region;

(d) employment opportunities within each housing region, including the growth and location of moderate- and low-wage jobs;

(e) the current per capita fiscal resources of each local government, defined by the total [nonresidential] real estate valuation of the local government, plus the total of all personal income, divided by current population;

(f) the relationship of each local government's median household income to the median household income of the region;

(g) the existing concentrations of low-and moderate-income households in each housing region;

(h) the location of urban growth area(s) in an adopted regional comprehensive plan;[125] and

[125]See Section 6-201, Preparation of Regional Comprehensive Plan, Alternative 2, of the *Legislative Guidebook* for a treatment of urban growth area designation.

(i) the existence of an area of critical state concern[126] and any restrictions on development placed on it.]

(5) The Council shall adopt criteria for the review and approval of regional fair-share allocation plans prepared and adopted by [regional planning agencies] under this Act.

(6) Each [regional planning agency] in the state created pursuant to [*citation to statute creating or authorizing regional planning agencies*] shall prepare a regional fair-share allocation plan within [18] months of the effective date hereafter, and shall update and amend the plan at least every [5] years. In preparing the plan, each agency shall use the estimates of present and prospective need adopted by the Council for the region, and may use guidelines, data, and methodologies developed by the Council, or such other data and methodologies, provided that such data and methodologies are supported by adequate documentation, represent accepted planning techniques, and achieve an equitable allocation of need for low- and moderate-income housing to the region's local governments.

(7)[127] Each [regional planning agency] shall adopt by rule the regional fair-share allocation plan. At least [30] days prior to adoption, the [regional planning agency] shall transmit a copy of the proposed plan to each local government in the region, to the [state planning agency *or similar state agency*], and to the Council. Any interested person may present oral testimony to the [regional planning agency] on the proposed rule. Such comments and testimony shall be incorporated into the public hearing record, in accordance with the provisions of Section [6-105].[128] A copy of the adopted rule shall be transmitted by the [regional planning agency] to each local government's legislative body, to persons requesting a copy, to the [state planning agency *or similar state agency*], and to the Council. In transmitting the rule to the Council, the [regional planning agency] shall petition the Council for review and approval of the plan.

(8) Upon the receipt of a [regional planning agency's] petition for review and approval of a regional fair-share allocation plan, the Council shall undertake and complete a review of the plan within [90] days of submission of a complete plan. The Council shall approve the plan in writing if it finds that it is consistent with the requirements of this Act and with any rules of the Council. In the event that the Council does not approve the plan, it shall indicate in writing to the [regional planning agency] what changes should be made in the plan in order that the Council may consider it for approval upon resubmission.

[126]See Section 5-201 *et seq*. of the *Legislative Guidebook*, which addresses areas of critical state concern.

[127]Alternatively, the regional fair-share allocation plan may be publicly reviewed in the manner proposed in Section 6-301, Public Workshops and Hearings, and adopted in the manner proposed in Section 6-303, Adoption of Regional Plans.

[128]Section 6-105 pertains to rule-making authority by the regional planning agency.

(9) In the event that a [regional planning agency] does not submit a petition for review and approval of a regional fair-share allocation plan within the period specified in this Act, fails to update the plan at least every [5] years, or fails to make changes as indicated by the Council within [90] days of the Council's decision on its petition and resubmits the plan for review and approval, the Council shall prepare a fair-share allocation plan for the region and shall adopt it in the manner provided for by paragraph (3), above. Upon adoption of the plan for a housing region, the Council may then also assume any duties of a [regional planning agency] as provided by Section [4-208.6(2)] of this Act for that housing region.

4-208.9 Contents of a Housing Element

(1) The housing element of the local government's comprehensive plan is intended to provide an analysis and identification of existing and prospective housing needs, especially for middle-, moderate-, and low-income housing, in its housing region and to set forth implementing measures for the preservation, improvement and development of housing. The housing element shall include all of the following, none of which may serve as a basis for excusing a local government from fulfilling its regional fair-share obligation:

(a) an inventory of the local government's housing stock by age, condition, purchase or rental value, occupancy characteristics, and type, including the number of units affordable to middle-, moderate-, and low-income households and the number of substandard housing units capable of being rehabilitated;

(b) a projection of the local government's housing stock, including the probable future construction of middle-, moderate-, and low-income housing for the next [5] years, taking into account, but not necessarily limited to, construction permits issued, preliminary as well as final approvals of applications for development, and all lands identified by the local government for probable residential development;

(c) an analysis of the local government's demographic characteristics, including but not necessarily limited to, household size, income level, and age of residents;

(d) an analysis of the existing and probable future employment characteristics and opportunities within the boundaries of the local government, especially those jobs that will pay moderate or low wages;

(e) an analysis of the existing and planned infrastructure capacity, including, but not limited to sewage and water treatment, sewer and water lines, and roads;

(f) a statement of the local government's own assessment of its present and prospective housing needs for all income levels, including its regional fair share for low- and moderate-income housing, and its capacity to accommodate those needs. The regional fair share as determined by the [Council *or* regional planning agency] shall form the minimum basis for the local government's determination of its own fair share;

(g) an identification of lands within the local government that are most appropriate for the construction of low- and moderate-income housing and of existing structures most appropriate for conversion to, or rehabilitation for, low- and moderate-income housing, including a consideration of lands and structures of developers who have expressed a commitment to provide low- and moderate-income housing and lands and structures that are publicly or semi-publicly owned;

(h) a statement of the local government's housing goals and policies;

♦ As part of the housing element, the local government can provide for its fair share by any technique or combination of techniques which provides a realistic opportunity for the provision of its fair share. The housing element should contain an analysis demonstrating that it will provide such a realistic opportunity. The local government should review its land-use and other relevant ordinances to incorporate provisions for low-and moderate-income housing and remove any unnecessary cost generating features that would affect whether housing is affordable. The model legislation provides, in (i) below, for the elimination or reduction of unnecessary cost generating features for all housing or affordable housing (on the theory that such action would reduce housing costs overall) or for only inclusionary developments (on the theory that it would ensure project feasibility).

(i) the text of adopted or proposed ordinances or regulations of the local government that are intended to eliminate or reduce unnecessary cost generating requirements for [all housing *or* affordable housing *or* inclusionary developments]; and

(j) the text of adopted or proposed ordinances or regulations of the local government that are intended to provide a realistic opportunity for the development of low- and moderate-income housing. Such ordinances or regulations shall consider the following techniques, as well as others that may be proposed by the local government or recommended by the Council as a means of assuring the achievement of the local government's regional fair share, removing barriers to and providing incentives for the construction of low- and moderate-income housing and generally removing constraints that unnecessarily contribute to housing costs or unreasonably restrict land supply:[129]

1. expanding or rehabilitating public infrastructure;

2. reserving infrastructure capacity for low- and moderate-income housing;

[129]For an interesting and creative statute providing financial incentives to local governments for removing barriers to low- and moderate-income housing (as well as middle-income housing), see Fla. Stat. §420.907 *et seq*. (1995) (State housing incentives partnership), esp. §420.9076 (Adoption of affordable housing incentive plans; committees).

3. establishing a process by which the local government may consider, before adoption, policies, procedures, ordinances, regulations, or plan provisions that may have a significant impact on the cost of housing;

4. designating a sufficient supply of sites in the housing element that will be zoned at densities that may accommodate low- and moderate-income housing, rezoning lands for densities necessary to assure the economic viability of any inclusionary developments, and giving density bonuses for mandatory set-asides of low- and moderate-income dwelling units as a condition of development approval;[130]

5. establishing controls to ensure that once low- and moderate-income housing is built or rehabilitated through subsidies or other means, its availability will be maintained through measures such as, but not limited to, those that establish income qualifications for low- and moderate-income housing residents, promote affirmative marketing measures, and regulate the price and rents of such housing, including the resale price, pursuant to Section [4-208.22] below;

6. establishing development or linkage fees, where appropriate, authorizing such other land dedications or cash contributions by a nonresidential developer in lieu of constructing or rehabilitating low- and moderate-income housing, the need for which arises from the nonresidential development, generating other dedicated revenue sources, or committing other financial resources to provide funding for low- and moderate-income housing. Such development or linkage fees, land dedications, cash contributions, and dedicated revenue sources may be used for the following activities or other activities approved by the Council: rehabilitation; new construction; purchase of land for low- and moderate- income housing; improvement of land for low- and moderate-income housing; and assistance designed to render units to be more affordable;

7. modifying procedures to expedite the processing of permits for inclusionary developments and modifying development fee requirements, including reduction or waiver of fees and alternative methods of fee payment;

8. using funds obtained from any state or federal subsidy toward the construction of low- and moderate- income housing; and

[130]While a local government may not want to designate specific sites for low- and moderate-income housing, it is nonetheless important to designate a sufficient supply of sites zoned at appropriate densities to assure an open, competitive land market.

9. providing tax abatements or other incentives, as appropriate, for the purposes of providing low- and moderate-income housing.

4-208.10 Submission of Housing Element to [Council *or* Regional Planning Agency]

(1) No later than [*date*], each local government shall prepare and submit to the [Council *or* regional planning agency] a housing element and a petition for approval in a form prescribed by the Council.

(2) The [Council *or* regional planning agency] shall complete the review of the housing element and determine whether to approve the element within [90] days after submission of a complete document. This [90] day period may be extended for an additional [60] days by the written consent of the local government and any objectors involved, or for good reason as determined by the [Council *or* regional planning agency].

- If a regional planning agency (such as a regional planning commission or council of governments) is in place, then approval of the local government's housing element would be undertaken by the regional planning agency.

- The initial years of the fair share program's operation will require closer scrutiny by the reviewing agency. However, as local governments gain experience with the program and demonstrate substantial achievement of goals, as an alternative, the reviewing procedures may be simplified and perhaps replaced by some type of self-certification by the local government. The self-certification process would have to be well-developed to allow for challenges by neighboring or affected jurisdictions and other third parties. In addition, the process would have to incorporate appropriate conflict resolution procedures.

4-208.11 Notice of Submission

(1) At the time of submission to the [Council *or* regional planning agency], the local government shall provide notice of the submission to all owners of land whose properties are included in the housing element for the development of proposed low- and moderate-income housing.

(2) In addition, notice shall be provided within [1] week of the date of submission to a newspaper of general circulation in the area in which the local government is located and to all other persons who requested it in writing.

(3) The notice shall specify that the housing element has been submitted to the [Council *or* regional planning agency] for approval and that all persons receiving a notice shall have the right to participate in the agency's mediation and review process if they object to the plan. The notice shall also specify that copies of the housing element are available for purchase at cost, and shall indicate where they may be reviewed or copied.

(4) The notice shall also state that objections to the housing element, or requests to participate in the mediation, must be filed within [30] days of the date of the mailing of the notices.

(5) If the housing element is a revision of an earlier submission, notice shall also be given to any owners of land whose properties were included in the prior submission but whose properties were omitted from the one currently being proposed.

4-208.12 Objection to Housing Element; Mediation

(1) If any person or entity to whom notice is required to be given, or who requests notice, files an objection, the [Council *or* regional planning agency] shall initiate a mediation process in which it shall attempt to resolve the objections to the housing element voluntarily. Any such objection must be filed within [30] days of the date of service of notice of the filing of the petition for approval.

(2) Objections shall be filed with the [Council *or* regional planning agency] and the local government with as many copies as the Council shall by rule require. The objections shall state with specificity the provisions of the element objected to, and the grounds for the objection to each, and shall contain such expert reports or affidavits as may be needed for an understanding of the objection. In the case of objectors whose lands have not been selected in the element for consideration for low- and moderate-income housing, the objection may also set forth why the lands of the objector are more likely to produce low-and moderate-income housing and either why one or more of the sites proposed by the local government are not realistically likely to produce such housing during the period in which the housing element is in effect or why such sites are not suitable for same.

(3) The mediation and review shall be conducted by a mediator who is either selected by the parties and approved by the [Council *or* regional planning agency] or appointed by the [Council *or* regional planning agency] from its own staff or from a list of outside mediators maintained by the [Council *or* regional planning agency]. The mediator shall possess qualifications not only with respect to dispute resolution, but also with respect to planning and other issues relating to the siting and development of low- and moderate-income housing. The mediation process shall be confidential so that no statements made in or information exchanged during mediation may be used in any judicial or administrative proceeding, except that agreements reached during the mediation process shall be reduced to writing and shall become part of the public record considered by the [Council *or* regional planning agency] in its review of the housing element.

4-208.13 [Council *or* Regional Planning Agency] Review and Approval of Housing Element

(1) The [Council *or* regional planning agency] shall grant its approval of a housing element if it finds in writing that:

(a) the element is consistent with the provisions of this Act and rules adopted by the Council;

(b) the element provides a realistic opportunity for the development of affordable housing through the elimination or reduction of unnecessary cost generating requirements by existing or proposed local government ordinances or regulations; and

(c) the element provides a realistic opportunity for the development of low- and moderate-income housing through the adoption of affirmative measures in the housing element that can lead to the achievement of the local government's regional fair share of low- and moderate-income housing.

(2) In conducting its review, the [Council *or* regional planning agency] may meet with the local government and may deny the petition or condition its approval upon changes in the housing element, including changes in existing or proposed ordinances or regulations. Any approval, denial, or conditions for approval shall be in writing and shall set forth the reasons for denial or conditions. If, within [60] days of the [Council's *or* regional planning agency's] denial or conditional approval, the local government refiles its petition with changes satisfactory to the [Council *or* regional planning agency], the [Council *or* regional planning agency] shall grant approval or grant approval subject to conditions.

[(3) Upon denying, conditionally approving, or approving a local housing element, the [regional planning agency] shall provide a notice of its actions to the Council within [10] days. Where the [regional planning agency] has approved or conditionally approved a housing element, it shall transmit a copy of the approved element with the notice to the Council.]

4-208.14 Adoption of Changes to Development Regulations After Approval

(1) Approval of any housing element by the [Council *or* regional planning agency] shall be subject to and conditioned upon the adoption by the local government of all amendments to ordinances or regulations proposed in the housing element by the local government within [90] days of such approval.

(2) Failure to adopt such changes in the housing element as approved by the [Council *or* regional planning agency] shall render approval of the element null and void and shall subject the local government to the provisions of Section [4-208.16] of this Act.

[4-208.15 Quasi-legislative Review]

[(1) Review by the [Council *or* regional planning agency] of a local government's housing element shall be considered a quasi-legislative decision of general application, and not a decision in a contested case requiring an adjudicatory hearing with the calling of witnesses, cross-examination, or the use of sworn testimony.

(2) The [Council *or* regional planning agency] may appoint hearing officers to conduct such fact finding proceedings as may be appropriate in the event that the [Council *or* regional planning

agency] in its discretion deems it appropriate to undertake more detailed fact finding prior to deciding whether to approve, disapprove, or approve a housing element with conditions.]

♦ The purpose of this Section is to avoid lengthy trial type administrative hearings with respect to the approval or disapproval of a housing element. This Section may be omitted if a more formal administrative hearing process is desired.

4-208.16 Appeal to Council of Decision Made by a Local Government Regarding an Inclusionary Development When a Housing Element is not Approved or is not Submitted

(1) In the event that the [Council *or* regional planning agency] denies approval of a housing element and the local government does not refile a petition for approval of a housing element, or the [Council *or* regional planning agency], upon reviewing a refiled petition, does not grant approval of the element, or a local government fails to submit a housing element for approval by [*date*], or a local government fails to update a housing element, an applicant seeking approval to build an inclusionary development shall have the right to appeal any denial or approval with conditions by the local government to the Council.

♦ The procedures in this Section could also be the responsibility of a separate appeals board or could be handled by a court. For an example of this, see Alternative 2 in Section 4-208, Application for affordable housing development; affordable housing appeals.

(2) Such an appeal may be taken to the Council within [30] days following receipt of a local government's decision of denial or approval with conditions of a proposed inclusionary development by filing with the Council a petition stating the reasons for the appeal. The petition for appeal shall be considered presumptively valid by the Council and the burden of proof shall be with the local government. Within [10] days following receipt of a petition, the Council shall notify the local government that issued the denial or approval with conditions that an appeal has been filed. The local government shall transmit to the Council within [10] days a certified copy of its decision, the application, and the hearing record for the application, if any.

(3) A hearing on the appeal shall be held by the Council within [45] days following receipt of the decision, application, and hearing record. The hearing shall be held on the record, consistent with the [*state administrative procedures act*]. The Council shall render a written decision on the appeal, stating findings of fact and conclusions of law within [30] days following the hearing, unless such time is extended by mutual consent of the petitioner and the local government that issued the decision. The Council may allow interested parties to intervene in the appeal upon timely motion and showing of good cause.

(4) In the case of a denial by the local government, the Council shall consider at the hearing on appeal, but shall not be limited to, the following issues:

(a) has the local government previously authorized or permitted the construction of low- and/or moderate-income dwelling units at least equal in number to its regional fair share; and

(b) the extent to which the project would cause significant adverse effects on the environment.

- Whoever promulgates rules for handling these appeals (i.e., the Council or a separate appeals board) should develop a list of evaluation parameters, perhaps in consultation with appropriate state environmental agencies and public health authorities, to determine whether a proposed project will cause "significant adverse effects" on the environment.

(5) In the case of approval with conditions by the local government, the Council shall consider at the hearing on appeal, but shall not be limited to, the following issues:

(a) whether the conditions are necessary to prevent the project from causing significant adverse effects on the environment; and

(b) whether these conditions render the project infeasible. For purposes of this Act, a requirement, condition, ordinance, or regulation shall be considered to render an inclusionary development proposed by a developer that is a nonprofit entity, limited equity cooperative, or public agency infeasible when it renders the development unable to proceed in accordance with the program requirements of any public program for the production of low- and moderate-income housing in view of the amount of subsidy realistically available. For an inclusionary development proposed by a developer that is a private for-profit individual firm, corporation, or other entity, the imposition of unnecessary cost generating requirements, either alone or in combination with other requirements, shall be considered to render an inclusionary development infeasible when it reduces the likely return on the development to a point where a reasonably prudent developer would not proceed.

(6) In the case of a denial by the local government, if the Council finds that the local government has not authorized or permitted the construction of low- and/or moderate-income dwelling units at least equal in number to its regional fair share and that the project as proposed would not cause significant adverse effects to the environment, it shall by order vacate the local government's decision and approve the application with or without conditions.

(7) In the case of approval with conditions by the local government, if the Council determines that the conditions, if removed or modified, would not result in the project causing significant adverse affect to the environment and that such conditions would otherwise render the construction or operation of the project infeasible, it shall by order modify or remove such conditions so that the project would no longer be infeasible and otherwise affirm the approval of the application.

(8) The decision of the Council in paragraph (3) above shall constitute an order directed to the local government and shall be binding on the local government, which shall forthwith issue any and all necessary permits and approvals consistent with the determination of the Council.

4-208.17 Review of Decisions of the Council [and Regional Planning Agency]

(1) A review of a final determination by a [regional planning agency] shall be taken to the Council within [30] days of the determination and the Council shall conduct a *de novo* review of the matter.

(2) A review of a final determination of the Council shall be filed with the [*appellate court of competent jurisdiction*] within [30] days of the determination.

♦ The appeal should go to the state's intermediate appellate court. It would thereafter be subject to normal review by the state's appellate court of last resort.

4-208.18 Enforcement of Housing Element Requirements

(1) Subsequent to the approval of the housing element by the [Council *or* regional planning agency], any person with an interest in land or property that has been identified in a housing element pursuant to Section [4-208.9(1)(f)] of this Act may apply to the Council for such order as may be appropriate in connection with the implementation of the element, or the approval of any application for development of the property for low- and moderate-income housing.

(2) Such enforcement action may be taken where it is alleged that the local government has failed to implement the element or has conducted the process of reviewing or approving an inclusionary development on the land in such fashion as to unreasonably delay, add cost to, or otherwise interfere with the development of low- and moderate-income housing proposed in the element.

♦ Practical experience in New Jersey has shown that low- and moderate-income housing developments, even when included in a duly approved housing element that has dealt with the zoning of a development, become the subject of intense controversy at the time of site plan or subdivision review. To ensure that an approved element is carried out, the Council should have the power to order compliance with the element.

4-208.19 Assistance of Court in Enforcing Orders

(1) The Council may obtain the assistance of the [*trial court*] in enforcing any order issued by the Council pursuant to this Act. In acting on any such application for enforcement, the court shall have all powers it otherwise has in addressing the contempt of a court order.

(2) In a proceeding for enforcement, the court shall not consider the validity of the Council's order, which may only be challenged by a direct appeal to the [*intermediate appellate court of competent jurisdiction*], in accordance with the provisions of Section [4-208.17(2)] of this Act.

♦ An agency's power to enforce its order is important. The agency should therefore have the authority to ensure that its mandates are carried out.

4-208.20 Council as Advocate

The Council may act as an advocate for affordable housing developments in the obtaining of federal, state, regional, or local government development approvals or any other permits, approvals, licenses or clearances of any kind which are necessary for the construction of an affordable housing development.

♦ The development may need additional state permits for wetlands, sewers, etc. The agency ought to alert other permitting entities that the affordable housing project is in the public interest so that other permits and approvals may be expedited.

4-208.21 Designation of Authority; Controls on Affordability of Low- and Moderate-Income Dwelling Units

(1) Each local government whose housing element has been approved by the [Council *or* regional planning agency] shall designate a local authority ("Authority") with the responsibility of ensuring the continued affordability of low- and moderate-income sales and rental dwelling units over time.

(2) The Authority shall also be responsible for: affirmative marketing; income qualification of low- and moderate-income households; placing income eligible households in low- and moderate-income dwelling units upon initial occupancy; placing income eligible households in low- and moderate-income dwelling units as they become available during the period of affordability controls; and enforcing the terms of any deed restriction and mortgage loan.

(3) Local governments shall establish a local authority or may contract with a state, regional, or nonprofit agency approved by the Council to perform the functions of the Authority.

Commentary: Controls on Resales and Re-Rentals

Affordability controls on resales and re-rentals are needed for several reasons. Affordable housing is often in short supply, so conserving the stock of new and rehabilitated affordable housing through controls serves an important public purpose. When government offers subsidies or other

incentives to encourage the development of additional affordable housing, unless there are controls on subsequent future sales prices or rent levels, there could be profiteering in the short term on the difference between the below-market subsidized price or rent and the higher prevailing market value or rent of the unit. The controls assure that when the government gives a subsidy, the public in return will receive a benefit in the form of a lasting supply of affordable housing.

The need for affordability controls on resales and re-rentals will obviously vary by community and region of the state.[131] While some housing markets may call for minimal controls, other markets may require controls that are more stringent in terms of length of time and scope. In addition, it is important to re-evaluate the controls as they apply to individual developments on a regular basis to ensure that they remain relevant to market conditions. The imposition of controls could serve as a disincentive to the production of affordable housing because they may limit future flexibility, marketability, and return on investment. Consequently, it may be necessary to link controls on resales and re-rentals with incentives that might include: density bonuses, public contributions or subsidies of infrastructure or land, and expedited permit processing. Subsidies, as used in this model, are specific to the project and do not include such devices as federal home mortgage interest tax deductions. By contrast, a subsidy could include the public assumption of the cost of installing water and sewer lines to the site for a low- and moderate-income housing project or the write-down of land costs.

In imposing controls on rentals and for-sale housing, it is important to recognize the differences between the two types of housing. Rental housing is typically the best alternative for housing people in the very-low-income groups and operators of subsidized housing are accustomed to accepting rent limits. However, rents should periodically be adjusted to reflect changing costs to assure economic and physical viability. In the rental case, the principal public policy objective is assuring an adequate supply of affordable units.

The for-sale case is complicated by a second public policy objective: helping families maintain their status as homeowners. Because homeownership entails many more elements of risk and expense than renting, it involves somewhat different public policy concerns. First, homeownership may not be the best choice for very-low income households. Second, there is a down payment and closing costs that are invested and put at risk. There is a longer lasting risk to good credit and a profound sense of personal failure for the foreclosed owners. There are also the financial burden and risk associated with maintaining a home, especially in facing large, unexpected maintenance items. In addition, locking into homeownership with long-term resale price controls constrains the homeowner's flexibility to respond to job or other life situations. These concerns, together with the public purposes served by homeownership, mean that resale price control terms should be more lenient in order to reward low-income homeowners with some measure of equity appreciation, if only to protect them from returning to renter status.

[131] Affordability controls may also be supplemented with other direct subsidies such as low interest loans to assist a homebuyer in making a down payment on a dwelling unit. Such a loan would be short term, such as five years, and would be recaptured in order to assist other future homebuyers of low- and moderate-income units.

One way to temper the effect of resale price controls on the subsidized homeowner is to offer him/her the option of paying the subsidy back (either fully or partially). The purpose of such a payback of subsidy or "recapture" is three-fold: (1) to guarantee that housing remains affordable for a reasonable period; (2) to ensure that the stock of low-and moderate-income housing is not later depleted if the unit is sold at a higher price; and (3) to create a pool of monies that may be used to construct or rehabilitate affordable units. Once the subsidy has been recaptured by the public to be recycled into other assisted housing, the homeowner would be free to sell at market prices and to use the equity toward the next home purchase. Because of the complexity of recapture systems, their design is probably best done as part of an administrative rule-making process as opposed to a state statute.

An example of how recapture might operate: A homeowner buys a subsidized unit and signs a right of first refusal agreement with the local government that gives the government the right to buy back the unit for the subsidized price with adjustments for inflation, broker fees, etc. If the homeowner pays back the full subsidy, the government would not exercise its option and the house could be sold at market value. Alternately, the government could resell the house as an affordable unit to a qualifying low- or moderate-income homebuyer.

4-208.22 Controls on Resales and Re-rentals of Low- and Moderate-Income Dwelling Units

(1) The provisions of paragraphs (2) through (7) below, and the provisions of Section [4-208.23] below, shall apply to newly constructed, rehabilitated, and converted low- and moderate-income sales and rental dwelling units that are intended to fulfill a local government's regional fair share obligations, provided that one or more of the following conditions are met:[132]

(a) The dwelling unit was constructed, rehabilitated, or converted with assistance from the federal, state, or local government in the form of monetary subsidies, donations of land or infrastructure, financing assistance or guarantees, development fee exemptions, tax credits, or other financial or in-kind assistance; and/or

(b) The dwelling unit is located in a development that was granted a density bonus or other form of regulatory incentive in order to provide low- and moderate-income housing; and/or

♦ Note that the various devices listed in subparagraphs (a) and (b) correspond to tools that are considered to be "subsidies," as defined in Chapter 3.

[132]If none of these conditions is present, then presumably the developer is operating outside of the local government's affordable housing program provided for under the Act. The developer would therefore not need any of the incentives or subsidies offered by the local government or other agencies.

(c) The dwelling unit was built subject to the terms of a local ordinance which requires the construction of low- and moderate-income housing as a condition of development approval.

(2) In developing housing elements, local governments shall determine and adopt measures to ensure that newly constructed low- and moderate-income sales and rental dwelling units that are intended to fulfill regional fair share obligations remain affordable to low- and moderate-income households for a period of not less than [15] years, which period may be renewed. The Authority shall require all conveyances of those newly constructed low- and moderate-income sales dwelling units subject to this Act to contain the deed restriction and mortgage lien adopted by the Council.[133] Any restrictions on future resale or rentals shall be included in the deed restriction as a condition of approval enforceable through legal and equitable remedies, as provided for in Section [4-208.23] of this Act.

(3) Rehabilitated owner-occupied single-family dwelling units that are improved to code standard shall be subject to affordability controls for at least [5] years.

(4) Rehabilitated renter-occupied dwelling units that are improved to code standard shall be subject to affordability controls on re-rental for at least [10] years.

(5) Dwelling units created through the conversion of a nonresidential structure shall be considered a new dwelling unit and shall be subject to controls on affordability as delineated in paragraphs (2), (3), and (4) above.

(6) Affordability controls on owner- or renter-occupied accessory apartments shall be for a period of at least [5] years.

(7) Alternatives not otherwise described in this Section shall be controlled in a manner deemed suitable to the Council and shall provide assurances that such arrangements will house low- and moderate-income households for at least [10] years.

4-208.23 Enforcement of Deed Restriction

(1) No local government shall issue a certificate of occupancy for the initial occupancy of a low- or moderate-income sales dwelling unit unless there is a written determination by the Authority that the unit is to be controlled by a deed restriction and mortgage lien as adopted by the Council. The Authority shall make such determination within [10] days of receipt of a proposed deed restriction and mortgage lien. Amendments to the deed restriction and lien shall be permitted only if they have been approved by the Council. A request for an

[133] A model deed restriction and lien for low- and moderate-income housing appears in 5 N.J.A.C., Ch. 93, App. I.

amendment to the deed restriction and lien may be made by the Authority, the local government, or a developer.

(2) No local government shall permit the initial occupancy of a low- or moderate-income sales dwelling unit prior to the issuance of a certificate of occupancy in accordance with paragraph (1) above and with its zoning code and other land development regulations.

(3) Local governments shall, by ordinance, require a certificate of reoccupancy for any occupancy of a low- or moderate-income sales dwelling unit resulting from a resale and shall not issue such certificate unless there is a written determination by the Authority that the unit is to be controlled by the deed restriction and mortgage lien prior to the issuance of a certificate of reoccupancy, regardless of whether the sellers had executed the deed restriction and mortgage lien adopted by the Council upon acquisition of the property. The Authority shall make such determination with [10] days of receipt of a proposed deed restriction and mortgage lien.

(4) The mortgage lien and the deed restriction shall be filed with the recorder's office of the county in which the unit is located. The lien and deed restriction shall be in the form prescribed by the Council.

(5) In the event of a threatened breach of any of the terms of a deed restriction by an owner, the Authority shall have all remedies provided at law or equity, including the right to seek injunctive relief or specific performance, it being recognized by parties to the deed restriction that a breach will cause irreparable harm to the Authority in light of the public policies set forth in this Act and the obligation for the provision of low- and moderate-income housing.

(6) Upon the occurrence of a breach of any of the terms of the deed restriction by an owner, the Authority shall have all remedies provided at law or equity, including but not limited to, foreclosure, recoupment of any funds from a rental in violation of the deed restriction, injunctive relief to prevent further violation of the deed restriction, entry on the premises, and specific performance.

4-208.24 Local Government Right to Purchase, Lease, or Acquire Real Property for Low- and Moderate-Income Housing

(1) Notwithstanding any other law to the contrary, a local government may purchase, lease, or acquire by gift, real property and any estate or interest therein, which the local government determines necessary or useful for the construction or rehabilitation of low- and moderate-income housing or the conversion to low- and moderate-income housing.

(2) The local government may provide for the acquisition, construction, and maintenance of buildings, structures, or other improvements necessary or useful for the provision of low- and moderate-income housing, and may provide for the reconstruction, conversion, or

rehabilitation of those improvements in such manner as may be necessary or useful for those purposes.

(3) Notwithstanding the provisions of any other law regarding the conveyance, sale, or lease of real property by a local government to the contrary, a local government's legislative body may, by [ordinance *or* resolution], authorize the private sale and conveyance or lease of a housing unit or units acquired or constructed pursuant to this Section, where the sale, conveyance, or lease is to a low- or moderate-income household or nonprofit entity and contains a contractual guarantee that the dwelling unit will remain available to low- and moderate-income households for a period of at least [15] years.

4-208.25 Biennial Report of the Council to Governor and Legislature

(1) By [*date*] of each even-numbered year, the Council shall prepare a report to the governor and legislature. The Council shall report on the effect of this Act on promoting the provision of affordable housing in the housing regions of the state. The report shall address, among other things: local governments with housing elements that have been approved, with or without conditions, or that have not been approved by [the Council *or* a regional planning agency]; the number of low- and moderate income dwelling units constructed, rehabilitated, purchased, or otherwise made available pursuant to this Act; the number and nature of appeals to the Council on decisions of local governments denying or conditionally approving inclusionary developments and the Council's disposition of such appeals; [regional planning agencies with regional fair-share housing allocation plans that have, or have not been approved;] actions that have been taken by local governments to reduce or eliminate unnecessary cost generating requirements that affect affordable housing; and such other actions that the Council has taken or matters that the Council deems appropriate upon which to report. The report may include recommendations for any revisions to this Act which the Council believes are necessary to more nearly effectuate the state's housing goal.

(2) Every officer, agency, department, or instrumentality of state government, of [regional planning agencies,] and of local government shall comply with any reasonable request by the Council for advice, assistance, information, or other material in the preparation of this report.

(3) The Council shall send the biennial report to the governor, members of the legislature, state agencies, departments, boards and commissions, appropriate federal agencies, [regional planning agencies], and to the chief executive officer of every local government in the state, and shall make the report available to the public. Copies shall be deposited in the state library and shall be sent to all public libraries in the state that serve as depositories for state documents.

Alternative 2 – Application for Affordable Housing Development; Affordable Housing Appeals[134]

4-208.1 Findings

The legislature hereby finds and declares that:

(1) there exists an acute shortage of affordable, accessible, safe, and sanitary housing for low- and moderate-income households in the state;

(2) it is imperative that action be taken immediately to assure the availability of such housing; and

(3) it is necessary for all local governments in the state to assist in the provision of such housing opportunities to assure the health, safety, and welfare of all citizens of the state.

4-208.2 Purpose

It is the purpose of this Act to provide expeditious relief from local ordinances or regulations that inhibit the construction of affordable housing needed to serve low-and moderate-income households in this state. The provisions of this Act shall be liberally construed to accomplish this purpose.[135]

4-208.3 Definitions

As used in this Act:

(1) "**Affordable Housing**" means housing that has a sales price or rental amount that is within the means of a household that may occupy moderate-, low-, or very low-income housing, as defined by paragraphs (9), (10), and (12), below. In the case of dwelling units for sale, housing that is affordable means housing in which mortgage, amortization, taxes, insurance, and condominium or association fees, if any, constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the rent and utilities constitute no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question.

[134]This model statute was drafted by Peter A. Buchsbaum, a partner in the law firm of Greenbaum, Rowe, Smith, Ravin, and Davis in Woodbridge, New Jersey, along with additional drafting and material by Stuart Meck, FAICP, Principal Investigator, and Michelle J. Zimet, AICP, Attorney and Senior Research Fellow, for the Growing Smart[SM] project.

[135]The text of this model is drawn from Conn. Gen. Stat. Ann. §8-30g; Mass. Gen. Laws Title 40B §§20 to 23; and Gen. Laws of R.I. §§43-53-1 to 53-8. These statutes, based on the original 1969 Massachusetts Affordable Housing Appeals Act, St. 1969, c. 774, resemble each other.

♦ Note that, for purposes of this model, the term "affordable housing" applies only to very-low-, low-, and moderate-income housing and does not apply to middle-income housing.

(2) "**Affordable Housing Developer**" means a nonprofit entity, limited equity cooperative, public agency, or private individual firm, corporation, or other entity seeking to build an affordable housing development.

♦ The inclusion of private developers, as well as nonprofit and governmental organizations, in this definition, is necessary to encourage a widespread participation in the development of affordable housing.

(3) "**Affordable Housing Development**" means any housing that is subsidized by the federal or state government, or any housing in which at least [20] percent of the dwelling units are subject to covenants or restrictions which require that such dwelling units be sold or rented at prices which preserve them as affordable housing for a period of at least [15] years.[136]

♦ The 20 percent standard for what constitutes lower income housing development has been used in New Jersey, particularly the *Mount Laurel II* case.[137]

(4) "**Approving Authority**" means the Planning Commission, Zoning Board of [Appeal *or* Adjustment], Governing Body, or other local government body designated pursuant to law to review and approve an affordable housing development.

(5) "**Development**" means any building, construction, renovation, mining, extraction, dredging, filling, excavation, or drilling activity or operation; any material change in the use or appearance of any structure or in the land itself; the division of land into parcels; any change in the intensity or use of land, such as an increase in the number of dwelling units in a structure or a change to a commercial or industrial use from a less intensive use; any activity which alters a shore, beach, seacoast, river, stream, lake, pond, canal, marsh, dune area, woodlands, wetland, endangered species habitat, aquifer or other resource area, including coastal construction or other activity.

(6) "**Exempt Local Government**" means:

(a) any local government in which at least [10] percent of its housing units, at the time an application is made pursuant to this Act, have been subsidized by the federal or state government, or by a private entity, and in which occupancy is restricted or intended for low- and moderate-income households;

[136]For an excellent example of a deed restriction based on years of successful experience in New Jersey, see 5 N.J.A.C., Ch.93, App. I, which contains the deed restriction for low- and moderate-income housing required by the State Council on Affordable Housing.

[137]*Mt. Laurel II*, 456 A.2d 390 at n.37.

(b) any local government whose median household income is, according to most recent census data, less than 80 percent of the median household income of the county or primary metropolitan statistical area as last defined and delineated by the U.S. Bureau of the Census in which the local government is located; or

(c) any local government whose percentage of substandard dwelling units in its total housing stock, as determined by the most recently available census data, is more than 1.2 times (120 percent) the percentage of such dwellings in the housing stock for the county or primary metropolitan statistical area in which the local government is located.

♦ This definition of "exempt" local governments, found in various forms in the New England statutes, recognizes that certain communities may have already met their burden of providing low- or moderate-income housing. See, for example, Conn. Gen. Stat. Ann. §8-30g(f). The county is suggested as a primary standard of comparison, but metropolitan areas may be substituted in place of a county. Use of an entire state would in most cases be impractical since entire regions of the state may have less than the statewide median income and use of the state as the base would thus exempt them from the applicability of the statute.

(7) "**Household**" means the person or persons occupying a dwelling unit.

(8) "**Local Government**" means the [county, city, village, town, township, borough, *or* other political subdivision] which has the primary authority to review development plans.

(9) "**Low-Income Housing**" means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that does not exceed 50 percent of the median gross household income for households of the same size within the county or primary metropolitan statistical area in which the housing is located. For purposes of this Act, the term "low-income housing" shall include "very low-income housing."

(10) "**Moderate-Income[138] Housing**" means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 50 percent but does not exceed 80 percent of the median gross household income for households of the same size within the county or primary metropolitan statistical area in which the housing is located.

[138]In some states where there a greater stratification of income and housing, a fourth category may be included entitled "middle-income" that would be defined as households with a gross household income that is greater than 80 percent but does not exceed 95 to 120 percent of the median gross household income for households of the same size within the county or metropolitan area in which the housing is located. See, e.g., 24 CFR §91.5 (Definition s– "Middle-income family").

(11) "**Unnecessary Cost Generating Requirements**" mean those development standards that may be eliminated or reduced that are not essential to protect the public health, safety, or welfare or that are not critical to the protection or preservation of the environment, and that may otherwise make a project economically infeasible. An unnecessary cost generating requirement may include, but shall not be limited to, excessive standards or requirements for: minimum lot size, building size, building setbacks, spacing between buildings, impervious surfaces, open space, landscaping, buffering, reforestation, road width, pavements, parking, sidewalks, paved paths, culverts and stormwater drainage, and oversized water and sewer lines to accommodate future development without reimbursement.

(12) "**Very Low-Income Housing**" means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income equal to 30 percent or less of the median gross household income for households of the same size within the county or primary metropolitan statistical area in which the housing is located.

4-208.4 Local Government Action on Affordable Housing Applications

(1) An affordable housing developer may file an application for an affordable housing development in any nonexempt local government with the Approving Authority, in accordance with a checklist of items required for a complete application previously established by [ordinance *or* rule of *the* Department of Housing and Community Development *or other state agency authorized by statute*].

(2) The Approving Authority shall review the application in accordance with the standards set forth in Section [4-208.5(1)] below, and shall have the power to issue a comprehensive permit which shall include all local government approvals or licenses, other than a building permit, necessary for the authorization of the affordable housing development. The Approving Authority shall hold at least [1], but no more than [3], public hearings on the proposal within [60] days of receipt of the application and shall render a decision within [40] days after the conclusion of the public hearing(s).

(3) Failure of the Approving Authority to act within this time frame shall mean that the Authority is deemed to have approved the application, unless the time frame is extended by a voluntary agreement with the applicant.

4-208.5 Basis for Approving Authority Determination

(1) The Approving Authority shall grant approval of an affordable housing development unless facts produced in the record at the public hearing or otherwise of record demonstrate that the development as proposed:

(a) would have significant adverse effects on the environment; or

(b) would significantly conflict with planning goals and policies specified in the local government's comprehensive plan, provided they are not designed to, or do not have the effect of, rendering infeasible the development of affordable housing while permitting other forms of housing.

(2) The Approving Authority may condition the approval of the affordable housing development on compliance with local government development standards, contained in an ordinance or regulation, which are necessary for the protection of the health and safety of residents of the proposed development or of the residents of the local government, or which promote better site and building design in relation to the area surrounding the proposed development, provided that any such ordinances or regulations must be equally applicable to both affordable housing development and other development, and provided that such conditions do not render the affordable housing development infeasible. The Approving Authority shall waive such local government development standards where their application would render the provision of affordable housing infeasible, unless such waiver would cause the affordable housing development to have significant adverse effects on the environment.

(3) For purposes of this Act, a requirement, condition, ordinance, or regulation shall be considered to render an affordable housing development proposed by an affordable housing developer that is a nonprofit entity, limited equity cooperative, or public agency infeasible when it renders the development unable to proceed in accordance with program requirements of any public program for the production of affordable housing in view of the amount of subsidy realistically available. For an affordable housing development proposed by an affordable housing developer that is a private for-profit individual firm, corporation, or other entity, the imposition of unnecessary cost generating requirements, either alone or in combination with other requirements, shall be considered to render an affordable housing development infeasible when it reduces the likely return on the development to a point where a reasonably prudent developer would not proceed.[139]

4-208.6 Appeal to [State Housing Appeals Board *or* Court]

(1) An affordable housing developer whose application is either denied or approved with conditions that in his or her judgment render the provision of affordable housing infeasible,

[139] For an existing statutory definition of "infeasible," see R.I. Gen. Laws §45-53.4(c), which provides:

> "Infeasible" means any condition brought about by any single factor or combination of factors, as a result of limitations imposed on the development by conditions attached to the zoning approval, to the extent that it makes it impossible for a public agency, nonprofit organization, or limited equity housing cooperative to proceed in building or operating low or moderate income housing without financial loss, within the limitations set by the subsidizing agency of government, on the size or character of the development, on the amount or nature of the subsidy, or on the tenants, rentals, and income permissible, and without substantially changing the rent levels and unit sizes proposed by the public agency, nonprofit organization, or limited equity housing cooperative.

may, within [30 *or* 45] days of such decision appeal to the [State Housing Appeals Board *or other state trial court*] challenging that decision. The [Board *or* Court] shall render a decision on such application within [120] days of the appeal being filed. In its determination of any such appeal, the [Board *or* Court] shall conduct a *de novo* review of the matter.

- The New England statutes are either silent on the burden of proof before the appeals board, or place the burden of proof on the local government.[140] Given the nature of the interests involved – municipal discretion vs. housing affordability – it is advisable to allow the appeal authority to conduct its own independent *de novo* review of the facts. Whether the applicant or the local government has the ultimate burden of proof is a question of policy for each state to determine as it balances the weight of affordable housing needs against local government planning discretion. Optional language on burden of proof is provided in paragraph (2) below.

(2) In rendering its decision, the [Board *or* Court] shall consider the facts and whether the Approving Authority correctly applied the standards set forth in Section [4-208.5] above.

[*add optional additional burden of proof language for (2)*]

[In any proceeding before the [Board *or* Court], the Approving Authority shall bear the burden of demonstrating that it correctly applied the standards set forth in Section [4-208.5] above in denying or conditionally approving the application for an affordable housing development.]

(3) The [Board *or* Court] may affirm, reverse, or modify the conditions of, or add conditions to, a decision made by the Approving Authority. The decision of the [Board *or* Court] shall constitute an order directed to the Approving Authority, and shall be binding on the local government which shall forthwith issue any and all necessary permits and approvals consistent with the determination of the [Board *or* Court].

(4) The [*appellate court of competent jurisdiction*] shall have the exclusive jurisdiction to review decisions of the [Board *or* Court].

[4-208.7 Enforcement]

[The order of the Board may be enforced by the Board or by the applicant on an action brought in the [*trial court*].]

- Where a housing appeals board rather than a court is selected, it must be given the authority to enforce its orders.

4-208.8 Nonresidential Development as Part of an Affordable Housing Development

[140]See Conn. Gen. Stat. Ann. §8-30g(c).

(1) An applicant for development of property that will be principally devoted to nonresidential uses in a nonresidential zoning district shall have the status of an affordable housing developer for the purposes of this Act where the applicant proposes that no less than 20 percent of the area of the development or 20 percent of the square footage of the development shall be devoted to affordable housing, except that the applicant shall bear the burden of proof of demonstrating that the purposes of a nonresidential zoning district will not be impaired by the construction of housing in that zoning district and that the health, safety, and welfare of the residents of the affordable housing will not be adversely affected by nonresidential uses either in existence or permitted in that zoning district.

(2) For purposes of paragraph (1) above, the square footage of the residential portion of the development shall be measured by the interior floor area of dwelling units, excluding that portion which is unheated. Square footage of the nonresidential portion shall be calculated according to the gross leasable area.

4-208.9 Overconcentration Of Affordable Housing

In order to prevent the drastic alteration of a community's character through the exercise of the rights conferred upon affordable housing developers by this Act, the requirements to approve affordable housing developments by a local government as specified in this Act shall cease at such time as:

(1) the local government fulfills the requirements to become an exempt local government, as defined in Section [4-208.3(6)]; or

(2) where the number of units of affordable housing approved and built pursuant to this Act exceeds [__,000] dwelling units over a period of [5] years.

♦ Jurisdictions where there is faster growth may experience a rush of affordable housing proposals. To prevent communities from becoming overwhelmed by the prospect that developers may charge out to buy or option land within one community where there is ample vacant land, and seek zoning changes, there should be some upper limit on the amount of housing that can be approved under the special procedures contained in this statute. For example, in New Jersey during the 1980s, some towns were faced with as many as 11 lawsuits by developers.[141] In the Section above, this occurs when the local government meets the requirements for an "exempt local government" in Section 4-208.3(6) or when a statutorily established limit on the number of units of affordable housing over a certain period of time is met.

[4-208.10 Housing Appeals Board]

[(1) Composition [*describe composition of housing appeals board and terms of members*].]

[141]See, e.g., *Field v. Franklin Twp.*, 204 N.J. Super. 445, 449 A.2d 251 (1985).

- If a housing appeals board, rather than the courts, is selected to administer the statute, the state will have to determine its composition. There should be representation by local and, if appropriate, county interests, by private for-profit and nonprofit developers of affordable housing, by planning interests, and by the public at large. Provided that the interests are reasonably balanced, there is no single correct answer either to the size of the body or the precise breakdown of appointees.[142] If a court is chosen, it should be the trial court of general jurisdiction in the state.

    [(2) Within [3] months after the effective date of this Act, the Housing Appeals Board shall adopt rules and regulations governing practice before it. The Board may adopt [subject to approval of the Department of Housing and Community Development *or other state agency*] such other rules and regulations as it deems necessary and appropriate to carry out its responsibilities under this Act.]

- The bracketed language in paragraph (2) gives the policy-making arm of the governor some input into substantive regulations. It is expected that general state administrative procedures acts will provide the procedural framework, such as notices, public hearings, publication, etc. for rule making, so that rule-making procedures need not be spelled out in this statute.

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[142]R.I. Gen. Stat. §45-53-7 provides the following board makeup:

Housing Appeals Board – (a) There shall be within the state a housing appeals board consisting of nine (9) members:

Housing Appeals Board

Represent:	Appointed by:
1 district court judge (chair)	Chief of district court
1 local zoning board member	Speaker of the house
1 local planning board member	Majority leader of senate
2 city and town council members	Speaker of the house
(plus an alternate) – representing	Majority leader of senate
municipalities of various sizes	(Governor)
1 affordable housing developer	Governor
1 affordable housing advocate	Governor
1 director of statewide planning or designee	Self-appointed
1 director of Rhode Island housing or designee	Self-appointed

(b) All appointed [sic] shall be for two (2) year terms, provided, however, the initial terms of members appointed by the speaker of the house and majority leader shall be for a period of one year. A member shall receive no compensation for his or her services, but shall be reimbursed by the state for all reasonable expenses actually and necessarily incurred in the performance of his or her official duties. The board shall hear all petitions for review filed under §45-53-5, and shall conduct all hearings in accordance with the rules and regulations established by the chair. Rhode Island housing [sic] shall provide such space, and such clerical and other assistance, as the board may require.

4-208.11 Publication of List of Exempt Local Governments

The [State Department of Housing and Community Development *or other state agency authorized by statute*] [shall *or* may] annually publish a list of exempt local governments.

4-208.12 Effective Date

This Act shall take effect upon its adoption.

PROCEDURES RELATED TO STATE PLAN MAKING, ADOPTION, AND IMPLEMENTATION

Commentary: Public Review and Hearings

The model legislation below describes a procedure for public consultation and hearings in the preparation, adoption, and amendment of plans. The procedure requires the state agency to initiate informational meetings shortly after beginning work on the plan and to conduct public hearings once a draft plan has been completed. The workshops and hearings must be preceded by public notice and must be geographically dispersed throughout the state. Alternate language has been provided to authorize use of computer accessible information networks, such as the Internet, as a mechanism for public notice and for distribution of the draft plan. The number of such hearings and workshops may be specified in the statute or left to the discretion of the state agency; as true throughout this *Legislative Guidebook*, the numbers of hearings and workshops proposed below are merely guidelines. While the statute does not provide so, because cost may be a consideration, it is a good practice for the state agency to distribute draft copies of the plan to affected governmental units and statewide interest groups in advance of the public hearings.

4-209 Workshops and Public Hearings[143]

(1) As used in this Section and Sections [4-210] through [4-212]:

[143]Portions of this Section pertaining to the form of the notice and submission of written and oral comments and recommendations have been adapted from the ALI, *A Model Land Development Code,* §2-305.

(a) "**State Plan**" means any one of the following:

1. the state comprehensive plan pursuant to Section [4-203];

2. the state land development plan pursuant to Section [4-204];

3. the state biodiversity conservation plan pursuant to Section [4-204.1];

4. the state transportation plan pursuant to Section [4-205];

5. the state economic development plan pursuant to Section [4-206];

6. the state telecommunications and information technology plan pursuant to Section [4-206.1]; and

7. the state housing plan pursuant to Section [4-207].

(b) "**Lead Agency**" means the state agency directed to prepare a state plan pursuant to one of the Sections referenced above.

(2) Within [90] days of initiating work on a state plan or any amendment to it, the lead agency shall conduct [not less than 4] informational workshops (or other type of public collaborative process that engages citizens in the preparation of plans) at different locations throughout the state. The purpose of these workshops is to inform the public as to the process and schedule for preparing the plan and to solicit public comment on potential goals, policies, guidelines, design alternatives, problems, potential solutions, and implementation measures before a draft of the plan is completed. The lead agency shall give notice by publication in a newspaper that circulates in the area served by the workshop, and may give notice by publication, which may include a copy of the draft plan or amendment, on a computer accessible information network, or by other appropriate means, at least [30] days in advance of the workshop.

(3) Upon completion of a preliminary draft of the state plan, the lead agency shall conduct [not less than 4] public hearings on the plan at different locations throughout the state. The lead agency shall give notice by publication in a newspaper which circulates in the area served by the hearing, and may give notice by publication, which may include a copy of the draft plan or amendment, on a computer accessible information network or by other appropriate means, at least [30] days in advance of the hearing.

(4) The notice of each workshop or public hearing shall:

(a) contain a statement of the substance of the workshop or hearing and a description of the substance of the proposed plan;

(b) specify the officer(s) or employee(s) of the lead agency from whom additional information may be obtained;

(c) specify a time and place where the work program or draft plan may be inspected before the hearing; and

(d) specify the date, time, place, and method for presentation of views by interested persons.

(5) The lead agency shall provide notice to:

(a) the chief executive officer of each [regional planning agency] and local government in the area served by the workshop or hearing; [and]

(b) the director of every relevant state agency; [and]

[(c) any other interested person who, in writing, requests to be provided notice of the workshop or hearing].

(6) The lead agency shall afford any interested person the opportunity to submit written recommendations and comments in the record of the hearing, copies of which shall be kept on file and made available for public inspection.

(7) The lead agency may establish additional procedures for the receipt of oral statements.

(8) The lead agency may prepare written responses to any written recommendations and comments submitted by any interested party. These responses may be included in the final plan document.

(9) Taking full account of the written and oral testimony presented at the public hearings, the lead agency shall make revisions in the preliminary draft plan as it deems necessary and shall prepare and distribute to all state and regional agencies, local governments, and other interested persons a final draft plan to be considered for adoption. The [adopting body *or* agency *or* person] may modify or amend the final draft plan before adopting it.

Commentary: Adoption of Plans

There are several ways in which a plan (and plan amendments) may be adopted at the state level: (1) the governor can adopt it by executive order; (2) the governor can submit the plan to the state legislature and the plan becomes effective after a certain period (e.g., 90 days) unless either house passes a resolution stating in substance that it does not favor the plan; (3) the governor can submit

it to the state legislature and the plan does not become effective until the legislature adopts it; or (4) if a state department or commission is responsible for preparing the plan, the state department head or commission can adopt the plan (see Table 4-4).

Commentary to the American Law Institute's *A Model Land Development Code* rejected the fourth alternative in which the state agency that prepared the plan – in this case, a State Land Development Plan prepared by the State Land Planning Agency – may also adopt it by administrative rule or regulation:

> The initial question [of providing for the adoption of the plan] is whether there should be any legal significance attached to a plan and if so, by whom should the plan be approved. If no legal significance is to be attached to the plan, then the plan is at most a "prestigious" recommendation to legislators and to government officials making land development decisions about how they ought to make decisions which significantly affect the development of the area being planned. A "prestigious recommendation" obviously can become a factor in any political debate or controversy concerning the desirability of the location of a proposed development.
>
> . . .The [State Land Development] Plan involves an expression of a high level of political policy and it is for this reason that the Plan must be consciously related to the political forces of government. It is clear that a recommendation, whether merely "prestigious" or something more, is more powerful if it is approved by someone other than the staff which prepared it.[144]

Some states, however, do authorize the approval of certain types of functional plans by the head of the state agency that prepared the plan, as opposed to a separate body. Examples include Indiana and Ohio (both providing for adoption of a state solid waste management plan by a state environment department head) and Minnesota (providing for the adoption of a state transportation plan by the state transportation commissioner).[145]

[144] ALI, *A Model Land Development Code*, Note to §8-406, 351.

[145] Ind. Stat. Ann §13-9.5-3-2 (Adoption and implementation of state solid waste management plan) (1994); Ohio Rev. Code §3734.50 (State solid waste management plan; adoption by director of environmental protection) (1995); Minn. Stat. Ann. §§174.01 to 174.03 (Statewide transportation plan) (1986 and 1995 Supp).

Table 4-4: Methods of State Plan Adoption and Their Pros and Cons

Method of Plan Adoption	*Pros*	*Cons*
Governor adopts plan by executive order	Provides recognition by governor and cabinet agencies	Excludes state legislature from approval process
Governor submits plan to state legislature; plan becomes effective within certain period unless rejected by either house	Provides review role for legislature, although role is negative	Limits authority of governor
Governor submits plan to state legislature; plan does not become effective until legislature adopts it	Provides review and adoption role for legislature; legislature could ask for changes in plan content	Can lead to stale-mate between governor and legislature over details of plan
State board or commission adopts plan	Provides for "prestigious" endorsement of plan by by outside, independent body	Excludes governor and legislature from approval process
State agency head adopts plan	Is appropriate when plan is highly technical document and negotiations over content are complex	Excludes governor and legislature from approval process

4-210 Adoption of Plans (Four Alternatives)

Alternative 1 – By Executive Order

A state plan or any amendment thereto shall become effective after the governor adopts it by executive order.

Alternative 2 – By Action of the Governor and State Legislature[146]

(1) [Upon a recommendation for approval by the state planning commission and submission by the commission of a state plan to the governor for approval,] [t]he governor shall approve or disapprove a state plan or any portion or amendment thereof within [30] days of receipt.

(2) Upon approving a state plan, the governor shall submit the state plan or amendment to [each house of the] the state legislature. [The plan shall become effective when adopted by the state legislature. *or* The plan shall become effective on the expiration of [90] legislative days or at the end of the legislative session, whichever is earlier, provided that neither house passes a resolution stating in substance that the house does not favor the plan.]

[(3) In the event that [either house of] the legislature disapproves the plan or amendment in whole or in part, the plan or amendment shall be deemed to be rejected and shall be returned to the lead agency.]

Alternative 3 – By Action of a State Board or Commission

A state plan or any amendment thereto shall become effective when adopted by affirmative vote of not less than the majority of the entire membership of the [state planning commission] [no later than [30] days] after the final public hearing on the plan by the [commission] at any meeting of the [commission] at which the chair is present.

Alternative 4 – By Action of a State Agency Head

A state plan or any amendment to it shall become effective when adopted by rule of the director of the lead agency.

[146] This section is an adaptation of §8-406(2), ALI, *A Model Land Development Code*, 350 (Adoption of State Land Development Plan).

Commentary: Certification of Plan to State Agencies, Regional Agencies, and Local Governments

This Section requires the state to transmit an adopted plan and amendments to it to various agencies and officials, deposit copies in state depository libraries, and make them available for sale to the public.

4-211 Certification of Plan; Availability for Sale

(1) Upon the adoption or amendment of a state plan pursuant to Section [4-210 *or cite to applicable Section nos*.], the [governor *or* director of the state agency *or* chair of the commission or board] shall, within [90] days, certify copies of the plan or amendment to:

(a) the director of each state agency;

(b) the director of each [regional planning agency] in the state;

(c) the chief executive officer of each local government in the state;

(d) the director of each local government's planning department or, where there is no local planning department, the chair of the local planning commission;

(e) each member of the state legislature;

(f) the state library and all public libraries in the state that serve as depositories of state documents; and

(g) [other interested parties].

(2) The [lead agency *or other state agency*] shall make the plan or amendment available for sale to the public at actual cost or a lesser amount.

♦ A state may have the equivalent of the Government Printing Office for the central publication of government documents to the public. If not, the agency that prepared the plan should make it available to the public.

Commentary: Effect of State Plans on State Agencies; Interagency Coordination

Once a state plan (whatever the subject area) is adopted, it could have the following effects:

(1) state agencies would be required to take the state plan and its planning goals "into consideration" when preparing functional plans, when siting, constructing, or reconstructing state facilities, or when making expenditures;

(2) state agencies would be required to develop, through administrative rule making, a process for ensuring that their plans, proposed capital expenditures, proposed legislation, etc. are consistent with the state plan, and should document their compliance with the state plan. It is not desirable to detail in a statute the internal procedures that an agency might formulate to ensure consistency. The processes for consistency will evolve over time through trial and error. Consequently, state agencies should be given latitude to formulate, refine, and otherwise amend these procedures through administrative rule making;

(3) state agencies would be required to periodically report on how they are incorporating the state plan's goals and policies into their routine administrative activities; and

(4) state agencies would be prohibited from undertaking any project that is inconsistent with an adopted state plan.

The following sections group these approaches under two alternatives: an advisory process; and a process requiring strict consistency. It is important to note that the broader the plan's scope, the more far-reaching the impacts on state agencies. The State Comprehensive Plan and the State Land Development Plan would have the broadest impacts. The various specialized functional plans focusing on transportation, housing, and economic development would have narrower impacts. When state agencies prepared strategic plans for their operations, they would need to coordinate them with the comprehensive, land development, and functional plans that have statewide operation or applicability.

4-212 Effect of State Plans on State Agencies; Interagency Coordination (Two Alternatives)

Alternative 1 – Agency Takes State Plan into Consideration[147]

[147]This alternative is derived from Conn. Gen. Stat. Ann. §16a-31 (1995 Supp.).

(1) Upon certification pursuant to Section [4-211] of a state plan or an amendment to the plan, each state agency shall take the state plan into consideration when preparing any other plan required by state or federal law, undertaking any capital project or development, proposing any budget, and/or maintaining or initiating any program.

(2) A state agency shall request, and the director [of the state planning agency *or* the office of the governor *or other state agency*] may provide, an advisory report commenting on the extent to which any of the actions specified in paragraph (1) above conforms to the state plan and the director shall provide such other advisory reports as the state agency deems advisable.

(3) Upon certification of a state plan, each state agency may establish, by rule, additional procedures to ensure the conformance of agency action with the plan.

Alternative 2 – Agency Required to Observe Strict Consistency[148]

(1) Upon certification pursuant to Section [4-211] of a state plan or an amendment to the plan, no state agency shall prepare any other plan required by state or federal law, undertake any capital project or development, propose any budget, or maintain or initiate any program that is inconsistent with that plan.

(2) Each state agency shall, within [90] days of the certification of a state plan, establish by rule procedures to ensure the consistency of agency action with the plan.

(3) Each state agency with authority affecting a state plan shall submit to the [state planning agency *or* office of the governor] within [90] days of the certification of the plan, a written report that addresses how each state agency has incorporated the goals and policies of the plan into its current and intended activities. The state agency shall revise the report as necessary but, in no case, less than once every [2] years.

(4) The [office of the governor] shall mediate any differences between state agencies regarding the consistency between agency plans, projects, developments, budgets, and programs and the state plan.

4-213 [Effect of State Plans on Regional and Local Agencies–See Sections 7-402.1 to 7-402.5]

4-214 [Resolution of Conflict Between State, Regional, and Local Plans; Certification –See Sections 7-402.1 to 7-402.5]

[148]This alternative is derived in part from Fla. Stat. Ann. §186.007 (1995 Supp.), the ALI *Model Land Development Code* §12-203, and Council of State Governments, "Comprehensive Planning and Land-Use Regulation Act," in *Suggested State Legislation 1990,* 49 (Lexington, Ky.: The Council, 1990), 9-28.

CHAPTER 4

STATE CAPITAL BUDGET AND CAPITAL IMPROVEMENT PROGRAM

Commentary: State Capital Budget and Capital Improvement Program

The following model legislation provides for a state capital budget and five-year capital improvement program to be formulated by the state planning agency under the general direction of the governor. The model also provides for a review role by the state planning commission, where one exists. The budget document may also be linked to the state comprehensive plan and state agency strategic plans where they exist. The capital budget and capital improvement program are then submitted to the state legislature for approval, or approval with modification. The legislative model is based on Texas, Maryland, and New Jersey statutes.[149] The model may need to be adapted by a state to conform to existing budgeting procedures.

4-301 Definitions

As used in this Act, the following definitions shall apply:

(1) "**Capital Improvement**" means any building or infrastructure project over $[,000] that will be owned by the state and purchased or built with direct appropriations from the state, or with bonds backed by the full faith and credit of the state, or, in whole or in part, with federal or other public funds, or in any combination thereof. A project may include construction, installation, project management or supervision, project planning, engineering, or design, and the purchase of land or interests in land.

(2) "**State Capital Budget**" means the [annual *or* biennial] budget for capital improvements proposed by the governor and adopted by the state legislature.

(3) "**State Capital Improvement Program**" means the [5]-year schedule of capital improvements for the state, the first [year *or* 2 years] of which is the capital budget. The capital improvement program is a proposed plan of expenditures and, except for the capital

[149]Texas Code Ann., Gov. Code, Tit. 10, Ch. 2057 (1995 Supp.); Md. Code Ann, State Finance and Procurement, §§3-601 to 3-607 (1995); N.J.S.A. §§40:55D-29 to 40:55D-31 (1995). For a good example of a state capital budget document, see State of Mississippi, *The Governor's Five-Year Mississippi Capital Improvement Program, Fiscal Years 1991-1995,* submitted by Ray Mabus, Governor (Jackson, Miss: Department of Finance and Administration, January 1, 1990).

improvements included in the capital budget, shall not constitute an obligation or promise by the state to undertake projects or appropriate funds for any project in years [2 to 5 *or* 3 to 5] of the schedule.

(4) "**State Agency**" means any state department, division, office, bureau, board, or commission authorized to expend monies under state law [*or cite to applicable Section no*.].

4-302 Submission of State Capital Budget and Capital Improvement Program

(1) No later than [*dat*e] of each [even-numbered] year, the [state planning agency] shall prepare and submit to the governor a proposed state capital budget and capital improvement program document, hereinafter referred to as the "document."

(a) The governor shall review the document [and shall refer it to the state planning commission for a recommendation on the necessity, desirability, and relative priority of capital improvement projects by reference to the state comprehensive plan [*and other state plans*] as identified in Section [4-203 *and cite to other applicable Section nos*.].

(b) The state planning commission shall make its report to the governor no later than [45] days after the date of transmittal of the document by the governor. The governor shall review such report before approving or revising the document. Upon approving or revising the document, the governor shall submit it no later than [30] days after receipt of the report of the state planning commission to the state legislature for consideration and adoption.

(c) The legislature may adopt the document as submitted, or with modifications. Where any member of the state legislature proposes to add, by amendment, to the document any capital improvement projects not included in the proposal of the governor, the [state planning agency] shall review such projects for consistency with the state comprehensive plan [*and other state plans*] and against criteria prepared pursuant to Section [4-303(2)] below. The [state planning agency] shall, in writing and within [30] days of the original date of the proposed amendment, recommend to the Governor and legislature as to whether such projects should be included in the document as proposed, or with modifications, before the legislature may adopt the document. The recommendation of the [state planning agency] shall not be binding on the legislature.

(2) No funds for a capital improvement project shall be encumbered or spent unless the project is included in the adopted capital budget.

4-303 Contents of State Capital Budget and Capital Improvement Program

(1) The capital improvement program shall include:

(a) a description of each capital improvement project, its costs, its sources of funds, its projected year(s) of implementation, its probable annual operating and maintenance costs, its probable revenues, if applicable and a statement of the relationship of the capital improvement to the state comprehensive plan [*and other state plans*] as identified in Section [4-203 *and cite to other applicable Section nos*.];

(b) a description of priorities used in selecting and scheduling projects;

(c) a projection of available funds for all capital improvements during the [5]-year period;

(d) an estimate of indebtedness to be incurred by the issuance of bonds for capital improvements proposed over the [5]-year period; and

(e) a summary table showing, by year, beginning fund balances, projected revenues or sources of funds, projected costs of all capital improvements for that year, and ending fund balances.

(2) The [state planning agency] shall develop and shall periodically revise and publish criteria and related instructions and guidance for the inclusion in the state capital improvement program of proposed capital improvement projects.

4-304 Participation by and Cooperation of State Agencies

(1) The governor and the [state planning agency] shall solicit proposals for capital improvement projects, advice, and recommendations of each state agency [and the state planning commission] before proposing the state capital budget and capital improvement program.

(2) The state capital budget and capital improvement program shall be consistent with the state comprehensive plan prepared pursuant to Section [4-203].

[(3) In formulating the capital budget and capital improvement program, the governor and [the state planning agency] shall take into account any strategic operational plan prepared by the state agency pursuant to Section [4-202].]

(4) The governor and the [state planning agency] may require a state agency to:

(a) submit information, reports, plans, and documentation; and

(b) answer inquiries in relation to proposed capital improvement projects.

(5) All state agencies shall cooperate in the preparation of the state capital budget and capital improvement program.

CHAPTER 4

SMART GROWTH ACT

Commentary: Smart Growth Act

In 1997, the State of Maryland enacted a "Smart Growth" act[150] aimed at directing new development into "priority funding areas." Under the statute, state funding of certain growth related projects is prohibited outside of these priority areas. The priority areas must meet state guidelines for intended use (including minimum density requirements) and adequacy of plans for sewer and water systems. Existing communities and areas where economic development is desired are eligible. Counties may also designate growth areas for new residential communities. The priority areas include the state's 154 municipalities, land within the Baltimore and Washington Beltways, 31 enterprise zones, and the locally designated growth areas.

Beginning October 1, 1998, the state is prohibited from funding "growth-related" projects not located in these priority growth areas. State funding is also restricted for projects in communities without sewer systems and in rural villages. The intention is, of course, to channel state monies into areas that are suited for growth and limit development in rural areas by not extending sewers or making transportation improvements that would spur growth. In this way, conversion of rural and agricultural lands to urban uses is slowed or at least actively discouraged through state policy. Local governments and private interests can, of course, spend their own funds outside of these priority growth areas, but they cannot expect state monies for infrastructure.

Other legislation that is part of the "Smart Growth" package is intended to support locally identified development areas. For example, the program facilitates the use of brownfields (abandoned or underutilized industrial sites that are either polluted or perceived to be polluted) through grants, low-interest loans, and limitations on liability in redeveloping those lands. It provides tax credits to businesses creating jobs in a priority funding area. A "Rural Legacy" program also makes state funds available to enable local governments and land trusts to purchase properties, development rights, or permanent easements in order to protect targeted rural greenbelts. The new initiative supplements the Maryland's agricultural lands preservation program and open space program.

Section 4-401 below is an adaptation, reorganization, and refinement of the Maryland law. The model authorizes the designation of three types of "smart growth areas": (1) central cities (which are intended to be specifically listed in the statute); (2) areas that have been designated by regional planning agencies or counties, in consultation with municipalities; and (3) other state-designated area that are required to meet certain criteria regarding distress or disinvestment, such as enterprise zones. With regard to areas described in (2), such areas must be served by existing or planned

[150]Md. Code Ann., State Fin. and Procurement (1999), §§5-B-01 *et seq.;* for a critique of this act, see Douglas Porter, "Maryland's Smart Growth" Program: An Evaluation of Recommendations, *PAS Memo* (American Planning Association, August 1999), 1-4.

public or private central water and sewer systems, and must meet certain density (for residential land use) and intensity (for industrial, commercial, and office use) requirements that are contained in the model. The requirements for central water and sewer and density and intensity are intended to ensure that development in such areas is supported by urban services and are relatively compact. Such regionally- or county-designated smart growth areas must be reviewed and certified by the state planning agency before they can become effective, though a regional planning agency may perform a portion of its own review.

The model limits the expenditure of state monies for growth-related projects, which it defines, to smart growth areas. It also defines expenditures for projects and related costs that are not covered by the act, such as minor building expansions and rehabilitation of state facilities and acquisition of conservation easement. Under certain circumstances, as described in paragraph (7), a specific state board may approve funding for a growth-related project that is not located in a smart growth area.

The model act also charges the state planning agency with a variety of duties, including establishing a process for the review of projects for compliance with the act, determining the location of a smart growth area in the case of a dispute, and providing information to the public on the administration of the act.

4-401 Smart Growth Act

(1) This Section shall be known as the "[*name of state*] Smart Growth Act."

(2) The purposes of this Section are to:

(a) encourage a pattern of compact and contiguous urban growth in locally designated smart growth areas that have been determined to be most suitable for growth;

(b) target funding by the State of certain projects and programs that serve to foster or influence growth in those smart growth areas;

(c) ensure that smart growth areas have or are planned to have suitable centralized water and sewer systems to support urban growth;

(d) establish a certification process for the designation of smart growth areas before those areas are eligible for certain state funding;

(e) require the [state planning agency] to administer the certification process and to review state projects and programs proposed in smart growth areas;

(f) stimulate private investment and reinvestment in existing communities and neighborhoods;

(g) direct growth away from agricultural land and critical and sensitive areas;

(h) use taxpayer dollars in a cost efficient and effective manner; and

(i) coordinate state agency decisions and actions to ensure the achievement of the purposes as stated in paragraphs (2)(a) through (h) above.

(3) As used in this Section:

(a) "**Average Density**" means: the total number of dwelling units divided by the total acreage of all lots and parcels in the area for which the principal permitted use in the applicable land development regulations is residential, but excluding the acreage of land:

1. dedicated to public use by easement in perpetuity or fee acquisition;

2. dedicated to recreational use;

3. subject to a conservation easement;

4. used for cemetery purposes;

5. identified by a local government as being in a 100-year flood plain or on which development is otherwise prohibited by local land development regulation; and

6. [*other*].

(b) "**Financial Commitment**" means that sources of public or private funds or combinations thereof have been identified which will be sufficient to finance public water or sewer facilities necessary to serve development within a smart growth area and that there is a reasonable written assurance by the persons or entities with control over the funds that such funds will be timely put to that end, provided that public funds shall not include funds provided by the state.

(c) "**Funding**" means any form of assurance, guarantee, grant payment, credit, tax credit, or other assistance, including a loan, loan guarantee, or reduction in the principal, obligation, or rate of interest payable on, a loan or a portion of a loan.

(d) "**Growth-Related Project**" means only the items set forth below:

1. any major transportation capital project, but excluding project planning and initial project planning;

2. funding by the [department of development *or similar agency*] for:

a. [construction or purchase of newly constructed single family homes or purchase of loans for newly constructed single family homes under [*cite to statute*]];

b. [acquisition or construction of newly constructed multifamily rental housing under [*cite to statute*]];

c. [*cite to statutes authorizing business development loans, grants, or similar programs*];

3. funding by the [state environmental protection agency] for:

a. construction of new or expanded water supply and distribution systems under [*cite to statute establishing grant or loan program*];

b. construction of new or expanded wastewater treatment and collection systems under [*cite to statute establishing grant or loan program, including revolving loan funds*];

4. funding by [*the state building commission, or similar agency*] for leases of property, construction of new or expanded buildings and facilities, or land acquisition for [*list or cite to categories of state agencies or types of activities covered*]; and

5. [*other*].

(e) "**Initial Project Planning**" means that portion of project planning that includes:

1. notification of local, state, and federal officials;

2. initial interagency review;

3. initial systems planning;

4. identification of alternatives for the scope and location of the project;

5. estimates of right-of-way requirements, including available detail regarding specific properties to be affected, and of costs;

6. public meetings for discussion of 1 to 5 above; and

7. reports of consultants, if such consultants have been retained for the analysis of alternatives.

(f) "**Major Transportation Capital Project**" means any new, expanded, or significantly improved transportation facility or service, including planning, environmental studies, design, right-of-way acquisition, construction, or purchase of essential equipment related to the facility or service.

(g) "**Minor Transportation Capital Project**" means any project for the preservation or rehabilitation of an existing transportation facility or service, including the planning, design, right-of-way, construction, or purchase of equipment essential to the facility or service.

(h) "**Project Planning**" means the phase in which engineering and environmental studies and analyses are conducted with full participation of the public, in addition to local, state, and federal agencies, to determine the scope and location of a proposed transportation project; and

(i) "**Smart Growth Area**" means an area that is:

1. listed under paragraph (4)(a) below;

2. designated under paragraph (4)(b) below; or

3. described in paragraph (4)(c) below.

(4) The following areas shall be considered smart growth areas under this Section, provided that areas described in paragraph (4)(b) below shall first be certified by the [state planning agency] pursuant to paragraph (9) as meeting the requirements prescribed therein:

(a) the following central cities [*list central cities in state*]:

1. [*insert name*];

2. [*insert name*]; and

♦ If a central city includes within its corporate limits areas not intended for development, as where a nature preserve is completely surrounded by a city, the indication of the city should list the excepted areas.

(b) an area that has been designated by resolution by the [regional planning agency] or county [legislative body], in consultation with the municipalities located in whole or in part in that region *or* county, which:

1. is served by a public or private central water and sewer system, or combination thereof, or planned to be served by a public water and sewer system for which the [state planning agency] has determined that there is

financial commitment to construct within a six-year period from the date of designation; and

2. with respect to that part of the area delineated for residential use or development:

a. there is required by the applicable local land development regulations a minimum average density of [6, or *insert number*] dwelling units or more per acre; and/or

b. there exists an average density of [6, or *insert number*] or more dwelling units per acre; and

3. with respect to those parts of the area delineated for industrial, commercial, or office use, there is required by the applicable local land development regulations a minimum floor area ratio of:

a. [0.20] for industrial use;

b. [0.40] for commercial use; and

c. [0.60] for office use; and

4. has sufficient land area to accommodate the urban growth projected for the smart growth area in the succeeding [5] year period by the regional or county comprehensive plan; and

5. determined in writing by the [state planning agency], pursuant to paragraph (9) below, to comply with the requirements of paragraphs (4) (b)1 through (4)(b)4 above.

(c) [*other state-designated areas that are required to meet certain criteria regarding distress and/or disinvestment, such as enterprise zones*].

(5) Growth-related projects do not include:

(a) minor transportation capital projects;

(b) projects by the [state department of general services, state building commission, *or similar agency*] for maintenance, repair, or renovations to existing facilities, or one-time additions to such facilities that do not increase the total floor area by more than [10] percent of the existing facility;

(c) acquisition of land for telecommunications towers, parks, conservation, and open space;

(d) acquisition of conservation easements;

(e) funding by [name of state agency] for any project financed with the proceeds of revenue bonds issued by [name of state agency] where the [director of agency] determines in writing that the application of this Section would conflict with any provision of federal or state law applicable to the issuance or tax-exempt status of the bonds, conflicts with any provision of any trust agreement between the [name of state agency] and any trustee, or would otherwise prohibit financing of an existing project or financing provided to cure or prevent any default under existing financing; or

♦ The state may, under this exception, continue payments on and refinance bonds that were issued to finance projects commenced prior to the adoption of this Section, where such state payment may be otherwise restricted or prohibited by this Section.

(f) any other project funding or other state assistance not listed under paragraph (3)(d) above.

(6) Except as otherwise provided in this paragraph and paragraph (7) below, beginning [*insert date*], the state shall not provide funding for a growth-related project if the project is not located within a smart growth area.

(a) The state may provide funding for a growth-related project not in a smart growth area without complying with paragraph (7) below for:

1. a project that is required to protect public health or safety;

2. a project involving federal funds, to the extent compliance with this Section would conflict or be inconsistent with federal law;

3. a project related to a commercial or industrial activity, which, due to its operational or physical characteristics, shall be located away from other development, including:

a. a natural resource-based industry;

b. an industry relating to agricultural operations;

c. an industry related to forestry operations;

d. an industry relating to mineral extraction;

4. a wastewater treatment plant or a water treatment plant, provided that the service area for the plant is contained within and limited to a smart growth area.

5. a tourism facility or museum that is required to be located away from other development by its necessary proximity to specific and unique historic, natural, or cultural resources.

(b) No growth-related project shall be approved pursuant to paragraph (6)(a)1 above unless the director of the respective state agency finds in writing that the project is required to protect public health or safety and states in the writing the basis for this finding.

(7) The state may provide funding for a growth-related project that is not located in a smart growth area if the project is determined by the [*existing state board, such as a controlling board, public works board, or state planning commission*] to comply with the requirements of this paragraph.

(a) The [state board] shall approve such a growth-related project if it determines in writing and by a majority vote that:

1. no reasonably feasible alternatives exist in another location within the county or an adjacent county; or

2. the growth-related project is a major transportation capital project that satisfies the requirements of paragraph (7)(b) below.

(b) The [state board] may approve a major transportation capital project outside a smart growth area, pursuant to paragraph (7)(a) above, if it finds that the project:

1. does not increase capacity by more than [10] percent, provided that the director of the state department of transportation and the director of the [state planning agency] first make the same determination in writing; and/or

2. connects two smart growth areas, provided that the director of the state department of transportation and the director of the [state planning agency] first determine in writing that:

a. adequate permanent access control or other similar measures are in place to prevent the smart growth areas from developing in such a manner that they merge; and

b. the project will prevent development that is inconsistent with the state comprehensive plan and state land development plan; and/or

3. has the sole purpose of providing control of access by the state department of transportation along an existing highway corridor.

(c) When making a written request to the [state board] for the purposes of this paragraph, the applicant shall:

1. demonstrate that no reasonably feasible alternative locations for the growth-related project exist within the county or an adjacent county; or

2. demonstrate in writing that the growth-related project is a major transportation capital project that satisfies the requirements of paragraph (7)(b).

(d) The [state board] may, at its discretion, require remedial actions to mitigate any negative impacts of the proposed growth-related project.

(8) The [state planning agency] shall:

(a) by administrative rule, and in consultation with the [state planning commission], establish a process for the development, and periodic updating of maps and descriptions of smart growth areas;

(b) for smart growth areas designated and submitted by [regional planning agencies] or counties under paragraph (4)(b) and paragraph (9) of this Section, review and determine in writing compliance with the requirements of paragraph (4)(b);

(c) in the case of a dispute, determine the location of a smart growth area;

(d) establish a process for the review of projects by appropriate state agencies and the [state planning agency] for compliance with this Section;

(e) provide to each state agency, as appropriate, and to local governments written and mapped descriptions of the location of smart growth areas; and

(f) provide, as necessary, information to the public on the administration of this Section.

(9) (a) To be eligible for funding of growth-related projects, a [regional planning agency] or county shall submit to the [state planning agency] any smart growth areas that it has designated pursuant to paragraph (4)(b) above, and which are consistent with the comprehensive plans of the region or county and the affected municipalities. The [regional planning agency] or county shall provide to the [state planning agency] all information necessary to show the precise location of the area(s), including maps of the area(s) showing the planning and zoning characteristics of the area(s), including documentation of average density and minimum floor area ratios, applicable land development regulations, a statement by each local government included in a smart growth area of consistency with the applicable local comprehensive plan, and existing and planned centralized water and sewer services, as appropriate.

(b) Upon submission of a smart growth area or areas by a [regional planning agency] or county or amendments to a existing regional or county smart growth area or areas, the [state planning agency] shall review, and, within [60 *or* 90] days of submission, determine in writing whether the smart growth area or areas meet(s) the requirements of paragraph (4)(b) above. If the [state planning agency] determines that the area or areas meet such requirements, it shall certify the approval of such areas.

(c) Prior to formal submission of a smart growth area, the [regional planning agency] or county may submit the proposed area to the [state planning agency] for informal technical assistance, review and comment, and the opportunity for public review in the manner prescribed by the [state planning agency].

(d) The [state planning agency] may enter into agreements with [regional planning agencies] to conduct the review required by subparagraph (b) above, but the responsibility to certify the approval of smart growth areas shall be retained by the [state planning agency] and shall not be delegated.

(e) The [regional planning agency] or county shall, at least every [five] years, review its smart growth area designations and determine in writing whether or not they still comply with the requirements of paragraph (4)(b) above. If the [regional planning agency] or county determines that the smart growth areas as currently designated no longer comply with paragraph (4)(b) above, it shall amend the designations appropriately.

(10) This Section may not be construed to prevent a state agency from providing technical assistance to a local government in an area that is not a smart growth area.

NOTE 4A – A NOTE ON STATE PLANNING GOALS

State plans address goals through a number of different approaches. State goals may be: (1) included in the legislation as part of a state planning act as is the case in Hawaii, Rhode Island, Vermont, and Washington; (2) developed by an independent process and later adopted by some body or agency (e.g., the governor, the legislature, the state planning agency) by administrative rule, as in Connecticut, Florida, New Jersey, and Oregon, and included in the plan document; or (3) approached as "visions" (e.g., Maryland) or "themes" intermixed with objectives and policies (e.g., Hawaii). (See Table 4-5.)

The process of creating goals often involves a public participation procedure driven by state administration. Oregon's statewide program for land-use planning, for example, is administered by the Department of Land Conservation and Development (DLCD).[151] As such, the DLCD is

[151]Ore. Rev. Stat., Ch. 197 (1994).

responsible for the creation, adoption, and implementation of Oregon's statewide planning goals.[152] Other statewide processes may involve a series of public meetings administered by a specified task force charged with developing a series of statewide visions. The process can be handled by a state agency or delegated to an independent organization that can obtain widespread dialogue and consensus. For example, a university-affiliated local government research institute or a private, nonprofit organization can also have an effective role managing a goal-setting process at the behest of the government agency. Because they may not be not seen as having a direct interest in the outcome of the goal-setting process, they may more easily help participants reach agreement.[153]

Setting State Planning Goals in Oregon

Here's how Arnold Cogan, AICP, former director of the Oregon Department of Land Conservation and Development, recalls the initial efforts in 1974 of setting statewide planning goals:

The entire process of involving others throughout Oregon was designed to work from the bottom up, providing access for all segments of the public at every step. We took every opportunity to remind citizens that this was one state program that was not coming to them from the top down. We could prove it because we had not yet even furnished our offices adequately, some staff had not even moved in, and yet, our first priority was coming out to the public for advice and counsel. The people of Oregon themselves developed a pride of ownership in the goals they helped to write. Oregonians know the land use program continues to reflect their values and priorities nearly two decades later.

There are advantages to goals devised and administered by an independent agency and later enacted as compared to goals included in the original legislation. Having an independent agency develop and review goals provides the goals with an agency that is responsible for them (a "home" – such as the DLCD). This encourages the agency to demonstrate greater accountability for the ultimate implementation of the goals. Goals contained in a separate document or developed through a rule-making process, rather than sprinkled throughout legislation, also indicate a clear direction or vision for the state. Most important, since state planning goals are often an evolving end, omitting them from the legislation provides states with an opportunity to more easily adapt and/or amend their goals to changing circumstances.

A list of typical subject areas for goals, with sample goals from selected states begins below.

[152]See Arnold Cogan, "Implementing SB100 – Getting Started" (unpublished manuscript, 1994). The first director of the Oregon Department of Land Conservation and Development, Cogan describes the process of reaching statewide agreement on planning goals.

[153]For a discussion of such organizations, see Judith Getzels, Peter Elliot, and Frank Beal, *Private Planning in the Public Interest: A Study of Approaches to Urban Problem Solving by Nonprofit Organizations* (Chicago: American Society of Planning Officials, October 1975), 66-77 (discussion of Regional Plan Association CHOICES '76 program for the tri-state metropolitan area surrounding New York City); and Bruce T. Levi and Larry Spears, "Public Policy Consensus Building: Connecting to Change for Capturing the Future," *North Dakota L. Rev.* 70 (1994): 311-351 (describing work of North Dakota Consensus Council).

Table 4-5: Policy/Plan Context of State Planning Goals

State	Brief Description/Context of State Goals	Identifying features
Hawaii *(Haw. Rev. Stat., Ch. 226)*	Hawaii State Plan, enacted as a statute, requires state agencies to conform decisions and other land-related actions to a series of goals, policies and objectives contained in the statute.	Goals enacted as a statute
Vermont *(Vt. Stat. Ann. Tit. 24, §4301 et seq.)*	Act 200 establishes 12 statewide substantive planning goals.	Mandatory conformance to goals by local governments eliminated in 1989
Florida *(Fl. Stat., Chs. 186 & 187)*	State Comprehensive Plan, adopted as a statute, establishes state goals and implementation policies for 24 program areas. Plan is required to provide standards and criteria for review and approval of state agency strategic plans and strategic regional policy plans.	Statewide Comprehensive Plan
Georgia *(Ga. Code Ann. §50-8-1 et seq.)*	Growth Strategies Act requires some 700 local governments to prepare plans that do not necessarily fit in with a state plan or goals, but must address minimum standards. State plan to reflect goals, policies and objectives of local government plans when completed.	"Bottom-up" planning system
Oregon *(Ore. Admin. Rules, Ch. 660, Div. 15)*	Land Conservation and Development Commission (LCDC) adopts and enforces 19 statewide planning goals, adopted after a complex publication and hearing process, to which local plans must conform.	Goals and funding monitored by LCDC
New Jersey *(N.J. Stat. Ann. §§52:18A-196 et seq.)*	New Jersey State Development and Redevelopment Plan (the "SDRP") establishes statewide goals and objectives for 13 program areas. Counties and municipalities negotiate incorporation of goals, objectives, etc., through cross acceptance process.	Divides state into 7 tiers. Uses maps to show locations for growth, development, and redevelopment
Washington *(Wash. Rev. Code Ann., Ch. 36.70A)*	Growth Management Act requires "growing" counties to prepare comprehensive plans that address 13 statewide goals.	Goals contained within GM Act
Rhode Island *(Gen Laws of R.I., Tit. 45, Ch. 22.2)*	Comprehensive Planning and Land Use Regulation Act lists 10 state goals with which local comprehensive plans must be consistent.	State also publishes State Guide Plan with goals and policies
Maryland *(1992 Md. Gen. Laws Ch. 437)*	Planning Act of 1992 requires all local governments to incorporate a series of 7 policy elements ("visions") set forth in the Act and lists a number of required local plan elements. The same policies adopted in local plans become the State's "Economic Growth, Resource Protection, and Planning Policy" – criteria used to judge future developments and projects.	Goals defined as "visions" or state "policy"

SOURCE: Adapted from David Callies, "The Quiet Revolution Revisited: A Quarter Century of Progress," *in Modernizing State Planning Statutes: The Growing Smart℠ Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: APA, March 1995), 19-26.

LAND USE

▶ To promote orderly growth and development that recognizes the natural characteristics of the land, its suitability for use, and the availability of existing and proposed public and/or private services and facilities. R.I. Gen. Laws §45-22.2-3 (1995).

▶ To establish a land-use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 3.

ECONOMIC DEVELOPMENT

▶ To provide a strong and diverse economy that provides satisfying and rewarding job opportunities and that maintains high environmental standards, and to expand economic opportunities in areas with high unemployment or low per capita incomes. Vt. Stat. Ann. §4302 (1995).

▶ Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, and encourage growth in areas of insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities. Wash. Rev. Code Ann. §36.70A.020 (1995).

▶ To provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 16.

HOUSING

▶ Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock. Wash. Rev. Code Ann. §36.70A.020 (1995).

▶ To promote a balance of housing choices, for all income levels and age groups, and which recognizes the affordability of housing as the responsibility of each municipality and the state. R.I. Gen. Laws §45-22.2-3 (1995).

▶ To establish and maintain an adequate supply of decent and affordable housing in a suitable living environment for all citizens. Office of Policy and Management, *Conservation and Development: Policies Plan for Connecticut 1992-1997* (Hartford, CT: The Office, n.d.), 54.

▶ The public and private sectors shall increase the affordability and availability of housing for low-income and moderate-income persons, including citizens in rural areas, while at the same time encouraging self-sufficiency of the individual and assuring environmental and structural quality and cost-effective operations. Fla. Stat. Ann. §187.201(5)(a) (1991).

▶ Provide adequate housing at a reasonable cost. New Jersey State Planning Commission, *Communities of Place: The New Jersey State Development and Redevelopment Plan* (Trenton, N.J.: The Commission, June 12, 1992), 10.

PUBLIC SERVICES OR FACILITIES, EXCLUDING TRANSPORTATION

▶ Florida shall protect the substantial investments in public facilities that already exist and shall plan for and finance new facilities to serve residents in a timely, orderly, and efficient manner. Fla. Stat. Ann. §187.201(18)(a) (1991).

▶ Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards. Wash. Rev. Code Ann. §36.70A.020 (1995).

▶ To plan and develop a timely, orderly, and efficient arrangement of public facilities and services to serve as a framework for urban and rural development. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 18.

TRANSPORTATION

▶ To provide for safe, convenient, economic, and energy efficient transportation systems that respect the integrity of the natural environment, including public transport options and paths for pedestrians and bicyclers. Vt. Stat. Ann. §4302 (1995).

▶ To provide an integrated, efficient, and economical transportation system which provides mobility, convenience, and safety which meets the needs of all citizens, including transit-dependent and disabled. Office of Policy and Management, *Conservation and Development: Policies Plan for Connecticut 1992-1997* (Hartford, CT: The Office, n.d.), 46.

▶ Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comp-rehensive plans. Wash. Rev. Code Ann. §36.70A.020 (1995).

NATURAL RESOURCE PROTECTION, EXCLUDING AIR QUALITY

▶ To provide for the wise and efficient use of Vermont's natural resources and to facilitate the appropriate extraction of earth resources and the proper restoration and preservation of the aesthetic qualities of the area. Vt. Stat. Ann. §4302 (1995).

▶ To consider the use of resources and the consequences of growth and development for the region and the state, as well as the community in which it takes place. Vt. Stat. Ann. §4302 (1995).

AIR QUALITY

▶ Florida shall comply with all national air-quality standards by 1987, and by 1992 meet standards more stringent than 1985 standards. Fla. Stat. Ann. §187.201(11)(a) (1991).

Policies & Guidelines for State Planning

Goals contained within state plans are very often supported by, or intermixed with, a series of policies, objectives, or guidelines. Three states (Oregon, Florida, and New Jersey) provide ways in which goals may be additionally supported:

Oregon
After a brief text to help clarify each of Oregon's goals, the Department of Land Conservation and Development prepared a series of guidelines that contain planning principles, followed by a list of implementation measures. For example, goal 14, URBANIZATION, describes a planning guideline to: "designate the amounts of urbanizable land to accommodate the need for further urban expansion, taking into account (1) the growth policy of the area, (2) the needs of the forecast population, (3) the carrying capacity of the planning area, and (4) open space and recreational needs." To encourage implementation, "Financial incentives should be provided to assist in maintaining the use and character of lands adjacent to urbanizable areas."

Florida
Florida's State Comprehensive Plan, adopted as a statute, clearly states a goal for each program area and lists a number of policies specific to that goal. Two policies falling under the goal of COASTAL AND MARINE RESOURCES are to: (1) "[a]ccelerate public acquisition of coastal and beachfront land where necessary to protect coastal and marine resources or to meet projected public demand," and (2) "[a]void the expenditure of state funds that subsidize development in high-hazard coastal areas."

New Jersey
New Jersey's State Plan contains eight general goals that provide a context for policy initiatives in an array of substantive areas. Within each substantive area is a listing of policies followed by a brief discussion. For example, under OPEN LANDS AND NATURAL SYSTEMS, policy 9 (Adequate facilities) provides: "Ensure that the character, location, magnitude and timing of growth and development is based on and linked to the availability of adequate recreational and open-space land needed to serve growth and development," and policy 25 (Water quality) states: "Forestry management practices should be designed to protect watersheds, wetlands, stream corridors and water bodies from non-point source pollution and unintended but potentially adverse effects of timber harvesting and deforestation."

▶ To achieve and maintain a quality of air that is protective of public health and welfare and that allows attainment of economic and urban development goals. Office of Policy and Management,

Conservation and Development: Policies Plan for Connecticut 1992-1997 (Hartford, Conn.: The Office, 1992), 91.

ENERGY

▶ To provide for sustainable and efficient use of energy and natural resources through least-cost planning techniques in order to provide a viable economy, a healthy environment, and a high quality of life. Office of Policy and Management, *Conservation and Development: Policies Plan for Connecticut 1992-1997* (Hartford, CT: The Office, 1992), 37.

▶ Florida shall reduce its energy requirements through enhanced conservation and efficiency measures in all end-use sectors, while, at the same time, promoting an increased use of renewable energy sources. Fla. Stat. Ann. §187.201(12)(a) (1991).

▶ To encourage the efficient use of energy and the development of renewable energy sources. Vt. Stat. Ann. §4302 (1995).

AGRICULTURAL AND FOREST LAND PRESERVATION

▶ To encourage and strengthen agricultural and forest industries. Vt. Stat. Ann. §4302 (1995).

▶ To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 7.

▶ To preserve and maintain agricultural lands. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 6.

INTERGOVERNMENTAL RELATIONS

▶ To promote consistency of state actions and programs with municipal comprehensive plans, and provide for review procedures to ensure that state goals and policies are reflected in municipal comprehensive plans and state guide plans. R.I. Gen. Laws §45-22.2-3 (1995).

▶ Ensure sound and integrated planning statewide. New Jersey State Planning Commission, *Communities of Place: The New Jersey State Development and Redevelopment Plan* (Trenton, N.J.: The Commission, June 12, 1992), 11.

▶ To establish a coordinated, comprehensive planning process and policy framework to guide decisions by municipalities, regional planning commissions, and state agencies. Vt. Stat. Ann. §4302 (1995).

▶ To encourage and assist municipalities to work creatively together to develop and implement plans. Vt. Stat. Ann. §4302 (1995).

URBANIZATION

▶ Revitalize the state's urban centers and areas. New Jersey State Planning Commission, *Communities of Place: The New Jersey State Development and Redevelopment Plan* (Trenton, N.J.: The Commission, June 12, 1992), 7.

▶ To plan development so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside. Vt. Stat. Ann. §4302 (1995).

▶ Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. Wash. Rev. Code Ann. §36.70A.020 (1995).

▶ Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development. Wash. Rev. Code Ann. §36.70A.020 (1995).

▶ To provide for an orderly and efficient transition from rural to urban land use. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 21.

CITIZEN PARTICIPATION

▶ To encourage citizen participation at all levels of the planning process, and to assure that decisions shall be made by municipalities, regional planning commissions, and state agencies. Vt. Stat. Ann. §4302 (1995).

▶ To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 1.

▶ The achievement of "[a] desired physical environment, characterized by beauty, cleanliness, quiet, stable natural systems, and uniqueness, that enhances the mental and physical well-being of the people." Haw. Rev. Stat. §226-4 (1995 Supp).

MISCELLANEOUS

Critical Areas

▶ Florida shall ensure that development and marine resource use and beach access improvements in coastal areas do not endanger public safety or important natural resources. Florida shall, through acquisition and access improvements, make available to the state's population additional beaches and marine environment, consistent with sound environmental planning. Fla. Stat. Ann. §187.201(9)(a) (1991).

▶ Florida shall protect and acquire unique natural habitats and ecological systems, such as wetlands, tropical hardwood hammocks, palm hammocks, and virgin longleaf pine forests, and restore degraded natural systems to a functional condition. Fla. Stat. Ann. §187.201(10)(a) (1991).

▶ To recognize and protect the unique environmental, economic, and social values of each estuary and associated wetlands; and to protect, maintain, where appropriate develop, and where appropriate restore, the long-term environmental, economic, and social values, diversity and benefits of Oregon's estuaries. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 26.

▶ To conserve, protect, where appropriate develop, and where appropriate restore, the resources and benefits of coastal beach and dune areas; and to reduce the hazard to human life and property from natural or man-induced actions associated with these areas. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 33.

Downtown Revitalization

▶ In recognition of the importance of Florida's developing and redeveloping downtowns to the state's ability to use existing infrastructure [sic] and to accommodate growth in an orderly, efficient, and environmentally acceptable manner, Florida shall encourage the centralization of commercial, governmental, retail, residential and cultural activities within downtown areas. Fla. Stat. Ann. §187.201(17)(a) (1995).

Education

▶ The creation of an educational environment intended to provide adequate skills and knowledge for students to develop their full potential, embrace the highest ideas and accomplishments, make a positive contribution to society, and promote the advancement of knowledge and human dignity. Fla. Stat. Ann. §187.201 (1995).

▶ To broaden access to educational and vocational training opportunities sufficient to ensure the full realization of the abilities of all Vermonters. Vt. Stat. Ann. §4302 (1995).

Families

▶ Florida shall strengthen the family and promote its economic independence. Fla. Stat. Ann. §187.201 (1991).

Historic Preservation

▶ Identify and encourage the preservation of lands, sites, and structures that have historical or archaeological significance. Wash. Rev. Code Ann. §36.70A.020 (1995).

▶ To identify, protect, and preserve important natural and historic features of the Vermont landscape, including
. . . important historic structures, sites, or districts, archaeological sites and archaeologically sensitive areas. Vt. Stat. Ann. §4302(D) (1995).

Natural Disasters and Hazards

▶ To protect life and property from natural disasters and hazards. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 11.

▶ Require local governments, in cooperation with regional and state agencies, to prepare advance plans for the safe evacuation of coastal residents. Fla. Stat. Ann. §187.201(7)(b)24 (1995).

▶ Require local governments, in cooperation with regional and state agencies, to adopt plans and policies to protect public and private property from the effects of natural disasters. Fla. Stat. Ann. §187.201(7)(b)25 (1995).

Property Rights

▶ Private property shall not be taken for public use without just compensation having been made. The property rights of land owners shall be protected from arbitrary and discriminatory actions. Wash. Rev. Code Ann. §36.70A.020 (1995).

▶ Florida shall protect private property rights and recognize the existence of legitimate and often competing public and private interests in land use regulations and other government action. Fla. Stat. Ann. §187.201 (1991).

Examples of additional subjects of goals contained in statutes and plans nationwide, but not contained in the above categories include:

Connecticut: water (supply and management); food production; waste; natural and cultural resources

Florida: children; the elderly; health; public safety; water resources; hazardous and nonhazardous materials and waste; mining; cultural and historical resources; governmental efficiency; the economy; agriculture; tourism; employment; plan implementation

Oregon: open spaces; scenic and historic areas; natural resources; recreational needs; Willamette River Greenway; ocean resources

Rhode Island: resources; open space (recreational); innovative development regulations; data collection and dissemination; comprehensive plan consistency; subsidized housing

Vermont: recreation

Washington: permits; natural resource industries; open space and recreation; environment

NOTE 4B – A NOTE ON STATE PLANNING APPROACHES TO PROMOTE AFFORDABLE HOUSING

There are several general approaches that states nationwide have employed to ensure (to varying degrees of success) the availability of housing, especially at appropriate locations in relation to work-sites, for low- and moderate-income households. These efforts have primarily been in the form of either voluntary legislation or court-mandated programs and have assumed three general molds that are described below: "bottom-up" approach; "top-down" approach; and appeals. Whatever the form, however, each method is an attempt to proactively remove barriers to affordable housing and place affirmative obligations on local governments to ensure its provision. In most cases, proactive state involvement has been especially critical as communities are often reluctant to initiate their own efforts to encourage affordable housing.

(1) **Bottom-up Approach.** A bottom-up approach to the provision of affordable housing is one in which the preparation of housing plans is a collaborative effort between a regional planning agency and local governments under state supervision. California is an example of a quasi-bottom-up approach.[154] California statutes require each local government to adopt "a comprehensive, long-term

[154]Since the California statutes are not strictly vertical (i.e., state-regional-local, the term "quasi" is used). For a critique and analysis of the California housing planning statutes, see Ben Field, "Why Our Fair Share Housing Laws Fail," in *Santa Clara L. Rev.* 34, no. 1 (1993), 35, in *Land Use and Environment Law Review 1995*, Stuart W. Deutsch and A. Dan Tarlock, eds. (Deerfield, Il.: Clark Boardman Callaghan, 1995), 145. This summary is adapted from Field's analysis, at 148-152.

general plan,"[155] with seven mandatory plan elements, one of which must address housing. The statute contains detailed requirements for the housing element which has six parts: review of the previous housing element; existing and projected needs assessment; resource inventory; identification of governmental and nongovernmental constraints on housing; quantified housing objectives; and housing programs.[156]

Under the statute, the primary factor in the local government's housing needs assessment must be the allocation of regional housing needs prepared by regional councils of governments (COGs) under state supervision. To establish this allocation, the California Department of Housing and Community Development (HCD) determines each COG's share of state housing needs for four income categories (very low, low moderate, moderate, and above moderate). Based on data provided by HCD relative to the statewide need for housing, each COG must then determine the existing and projected need for its region. The HCD has 30 days to review the COG's determination "to ensure that it is consistent with the statewide housing need" and may revise the need figure "if necessary to obtain consistency."[157] The COG must determine, with HCD's advice, each city's or county's share. The statute does not spell out the formula the COGs are to use in allocating the need, but instead provides a list of criteria.[158] The COGs design the assumptions and methodologies themselves and submit them to HCD. They also submit their draft allocations for local comment and conduct public hearings on them before they become final. Local governments can then propose revisions to their assessed shares of needs before the allocations become final.[159]

Local governments must then include the COG's share of regional housing need in their individual housing plans.[160] The statutes require that a local governments's housing element identify specific sites to accommodate housing needs for all household income levels and "provide for sufficient sites with zoning that permits owner-occupied and rental multifamily residential use by right, including density and development standards that could accommodate and facilitate the feasibility of housing for very low and low-income households."[161] Local governments must periodically revise the housing elements as appropriate, but not less than every five years.[162]

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[155]Cal. Gov't. Code §65302 (1987 and Supp. 1995).

[156]Id. §65583.

[157]Id. §65584(a).

[158]Id.

[159]Id. §65584(c).

[160]Id., §65583((a)(1) (providing that "[t]hese existing and projected needs shall include the locality's share of the regional housing need in accordance with Section 65584" of the Cal. Gov't. Code).

[161]Id., §65583(c)(1).

[162]Id., §65588(b).

HCD has the authority to review local housing elements or amendments to determine whether they "substantially comply" with the statute prior to their adoption by the governmental unit. HCD may submit written comments which the local government may then incorporate into the housing element or amendment.[163] Alternatively, the local government may adopt the draft element or amendment without changes, provided that the legislative body includes in its adopting resolution findings that indicate why it believes the element or amendment "substantially complies" with the statute, despite HCD's findings.[164] Upon adoption, the local government must send a copy of the element or amendment to HCD.[165]

Beyond this, HCD (and the COGs, for that matter) has no authority to enforce the law, other than providing the advisory analysis of whether the element or amendment complies with the law, or withholding state distributed Community Development Block Grant or other federal monies. While the California statutes do permit private action[166] to compel a local government to meet its legal obligations, according to one analysis, the state courts are often reluctant to intervene in local land use decisions.[167]

As of 1993, 219 of the 527 (42 percent) local governments had housing elements that were in substantial compliance with the requirements of the California statute. One observer noted:

> In light of prevalent noncompliance with the housing element law, it is not surprising that localities are not meeting their fair share targets. The failure to meet fair share targets most severely impacts the lower end of the housing market. In 1985, it was established that 600,000 low-income units would be needed by 1990. Only 16 percent, or 97,424, of the needed units were built. Twenty-four percent of California localities did not produce a single low-income housing unit during the five-year period from July 1987 to July 1992. Although localities appear to have been more successful in generating moderate-cost housing developments, there remains a substantial gap between median home prices and incomes of first- time home buyers.[168]

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[163]Id., §§65585(b) to (e).

[164]Id., §65585(f).

[165]Id., §65585(g).

[166]Cal. Gov't. Code, §§65587(b) and (c). For a discussion of problems in obtaining judicial enforcement under the "substantially complies" standard of compliance in the statute, as well as other obstacles, see Field, "Why our Fair Share Housing Laws Fail," 157-171.

[167]Id., 164-171.

[168]Id., 155, citing California Coalition for Rural Housing, Local Progress in *Meeting the Low Income Housing Challenge: A Survey of California Communities Low Income Housing Production* (1989), 1, 3, and 4.

An analysis prepared for the U.S. Department of Housing and Urban Development reached a similar conclusion: "While much has been accomplished," it found, "the overall California housing planning process – and the local elements, specifically – have made only a start in fully meeting the state's overall housing needs, especially at affordable levels."[169]

Another example of a more pure form of bottom-up approach is the fair-share model first proposed (but never enacted by any state) by the U.S. Advisory Commission on Intergovernmental Relations in 1975.[170] The ACIR model mandated regional planning agencies to prepare a regional low- and moderate-income housing allocation plan and submit it to an appropriate state administrative agency. However, in contrast to the California approach which incorporated concepts from the ACIR model, no statewide need is computed. Rather, based on the regional estimate of need, each city and county is allocated a fair share of the regional total pursuant to several statutory criteria. The regional plan and allocations must be reviewed annually and revised as necessary. Local governments and the residents must be notified of the proposed plan and allocations. Citizens must be allowed to be present and be heard at a public hearing prior to the plan's adoption by the agency.

The ACIR model permits local governments to grant density bonuses to developers in exchange for making substantial provisions for low- and moderate-income housing. It also provides that proposals for affordable housing projects be filed with the local government which must hold a public hearing on the application and render a decision within a fixed period of time. If the local governments' regional fair-share allocation is not satisfied or reasonably provided for at the time of the hearing, it must approve the application, with or without conditions.

If a project is either denied or approved with conditions, the statute allows the applicant to appeal the local decision to a state planning agency. The issues that may be appealed to the state are limited to: (1) whether the local government has satisfied or provided for the attainment of its regional fair share; and (2) whether conditions attached to the local approval would render the construction or operation of the project economically infeasible. After a formal public hearing, the state agency may vacate the local denial or modify the conditions appropriately. In making its determination, the state agency must also consider the state development plan and any relevant local plans and programs. State agency orders may be enforced by the petitioner, a regional agency, or the state agency.

The ACIR model requires the state housing finance agency to endeavor to satisfy a local government's regional fair share if the state agency determines after a hearing that the local government has not satisfied or is not attempting to satisfy its fair share. The state housing finance agency is authorized to lease space in privately owned dwellings in jurisdictions that fail to meet fair- share allocations.

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[169]Burchell, Listokin, and Pashman, *Regional Housing Opportunities*, 77.

[170]U.S. Advisory Commission on Intergovernmental Relations (ACIR), *ACIR Legislation Program No. 6, Housing and Community Development* (Washington, D.C.: U.S. GPO, December 1975), 137-144. The description of the ACIR legislation is taken from the model statute's summary, 138.

(2) **Top-Down Approach.** The top-down approach to the provision of affordable housing is one in which the state (often by court mandate) establishes housing goals for individual local governments based on regional needs projections. New Jersey is an example of a state that has adopted a top-down approach. In New Jersey, a specialized state agency, the Council on Affordable Housing (COAH) created by the State's Fair Housing Act of 1985,[171] oversees the affordable housing effort. The New Jersey statute was prompted by the *Mt. Laurel* anti-exclusionary zoning cases decided by the New Jersey Supreme Court in 1975 (*Mt. Laurel I*)[172] and 1983 (*Mt. Laurel II*).[173] The Act was upheld by the New Jersey Supreme Court in 1986 (*Mt. Laurel III*).[174]

In those rulings, the New Jersey Supreme Court held that the state's local zoning statutes had to be read in the context of a state – not federal – constitutional requirement to legislate "for the general welfare."[175] Local governments that enacted zoning had an obligation to provide realistic opportunities for low- and moderate-income housing. Any zoning ordinance that denied reasonable opportunities to meet the local government's fair share of a region's low- and moderate-income housing need failed the state's constitutional requirements in this regard.

The statute charges COAH with determining housing regions for the state and estimating the present and prospective need for low- and moderate-income housing at the state and regional levels. COAH is to then allocate a fair share to each municipality in the housing region and can make adjustments based on environmental, infrastructure, historic preservation, or other considerations.[176]

Municipalities may then elect to complete housing elements.[177] In the element, municipalities must show how they will address the present and prospective need figures calculated by COAH and identify techniques, including subsidies and amendments to zoning codes, for providing low- and moderate-income housing. A municipality may petition COAH for "substantive certification" of its housing element.[178] COAH can grant substantive certification if the petitioning municipality's housing element is found to "make the achievement of the municipality's fair share of low- and

[171]N.J.S.A. §52:27D-301 *et seq*. (1986 and Supp. 1995); see Harvey S. Moskowitz, "State and Regional Fair-Sharing Housing Planning," in *Modernizing State Planning Enabling Legislation: The Growing Smart[SM] Working Papers, Vol. 1,* Planning Advisory Service Report No. 462/463 (Chicago, Ill: APA Planners Press, March 1996), 153-157.

[172]*Southern Burlington Co. NAACP v. Twp. of Mt Laurel*, 67 N.J. 151, 336 A.2d 713, appeal dismissed and cert. denied, 423 U.S. 808, 96 S.Ct. 18, (1975).

[173]*Southern Burlington Co. NAACP v. Twp. of Mt Laurel*, 92 N.J. 158, 456 A.2d 390 (1983).

[174]*Hills Development Co. v. Twp. of Bernards*, 103 N.J. 1, 510 A.2d 621 (1986).

[175]*Mt. Laurel I,* 336 A.2d at 726.

[176]N.J.S.A. §52:27D-307 (duties).

[177]Id., §52:27D-310.

[178]Id., §52: 27D-314.

moderate-income housing realistically possible."[179] The certification may be linked to the adoption of ordinances, such as rezoning to higher densities, that implement the housing element.[180]

Preparation of the housing element and petitioning for substantive certification are voluntary. The primary incentive for substantive certification is protection from the "builder's remedy" contained in the *Mt. Laurel II* decision.[181] The builder's remedy is a legal mechanism by which builder/developers can petition the courts for permission to proceed with an affordable housing development in communities that have previously failed to authorize such housing or have approved only minimal amounts. Substantive certification to a municipality by COAH provides a statutorily created "presumption of validity" against any claim against the local government in an exclusionary zoning lawsuit brought against it.[182]

According to a 1994 analysis by Rutgers University's Center for Urban Policy Research, the Fair Housing Act and the *Mt. Laurel* rulings have had the following impact in New Jersey:

- Overall, 57,174 affordable housing units have been zoned for, constructed, rehabilitated, or planned for over the period 1987 to 1992. Of these, about 25 percent of this activity has taken place under COAH's jurisdiction; another 75 percent has been influenced by the presence of COAH or its predecessor, the courts of New Jersey.

- Of the 57,174 units, about 13, 831, or 25 percent, have actually been constructed. Of these, about 53 percent has taken place under COAH's jurisdiction, and the remaining 47 percent has been influenced by either COAH or the courts.

- Another 40,343 units (75 percent of all affordable housing activity) are zoned or planned for rehabilitation in the future. Of these, 15 percent has taken place under COAH's jurisdiction and the remaining 85 percent has been influenced by COAH or the courts.

- Over a five-year period, COAH and the courts have overseen or influenced affordable housing at a rate of 11,000 land parcels per year. Over 25 percent of this number annually has come to fruition in the form of developed or rehabilitated housing.[183]

(3) **Appeals Approach.** As its name suggests, an appeals approach to the provision of affordable housing is based on the existence of a state-level appeals process in which a court or a special board reviews local decisions regarding proposed affordable housing developments. Three

[179]Id., §52: 27D-314(b).

[180]Id.

[181]*Mt. Laurel II,* 456 A.2d at 446-50; see also N.J.S.A. §27D-328 (Denial of builder's remedy in exclusionary zoning litigation after January 20, 1983; exception; termination).

[182]N.J.S.A. §52:27D-317.

[183]Burchell, Listokin, and Pashman, *Regional Housing Opportunities*, 97. Much of the 1987-1992 activity under the Fair Housing Act, it should be noted, occurred during a severe housing recession.

New England states, Massachusetts,[184] Connecticut,[185] and Rhode Island,[186] now provide for a direct appeal and override of local decisions which reject or restrict proposals for low- or moderate-income housing. They have each established a procedure by which an appeals board (in Massachusetts[187] and Rhode Island) or a court (in Connecticut) can set aside local zoning decisions blocking housing developments that receive federal or state assistance.[188]

These statutes tend, either explicitly or implicitly, to reverse or shift the burden of proof. The local government must now justify its exclusion of the affordable housing project, or the conditions that make the project economically infeasible, whereas before, developers had the burden of showing why they should be granted relief from zoning requirements.

Shifting the burden of proof in the housing appeals statutes serves several important purposes:

> They are strong statements that affordable housing is a state priority to which local governments must be sensitive. They provide teeth for local and regional housing plans without forcing local governments to relinquish control over land development. And they give affordable housing advocates and developers a means to overcome opposition to such housing.[189]

The affordable housing appeals statutes are not planning statutes per se; they require no planning framework at the state, regional, or local levels. However, housing goals may enter into the state appeals process. In Rhode Island, for example, local zoning and other land use ordinances are to be considered "consistent with local needs" if they implement a comprehensive plan with a housing element that provides for low- and moderate-income housing in excess of ten percent of the housing units in the community.[190] Whether the local government meets, or plans to meet, the 10 percent

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[184]Mass. Gen. Laws Ch. 40B, §§20-23 (West 1994).

[185]Conn. Gen. Stat. Ann., Ch. 126a, §8-30(g) (1995 Cum Supp).

[186]R.I. Gen. Laws, Ch. 53, §45-53-1 *et seq*. (1999).

[187]The state and federal constitutional validity of statutes in Massachusetts has been affirmed in several Massachusetts decisions. See, e.g., *Mahoney v. Bd. of Appeals of Winchester*, 366 Mass. 228, 316 N.E.2d 606, appeal dismissed 420 U.S. 903 (1974); *Bd. of Appeals of Hanover v. Housing Appeals Committee in Dept. of Community Affairs*, 363 Mass. 339, 294 N.E.2d 393 (1973).

[188]These statutes are discussed in "Housing Appeals Boards: Changing Presumptions about Affordable Housing," by Peter Salsich, Jr. in *Modernizing State Planning Enabling Legislation: The Growing Smart[SM] Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996), 159-162.

[189]Salsich, "Urban Housing," 208-209.

[190]R.I. Gen. Laws, Ch. 53, §45-53-3(b) (1999). See *Curran v. Church Community Housing Corporation*, 672 A.2d 453 (R.I. 1996) (holding that where existing zoning ordinance was outdated and did not conform to town's recently adopted comprehensive plan, decision of local zoning board of review to approve application for special exception to

requirement is a standard under which a case is reviewed when a local decision involving an affordable housing project is appealed.[191]

How have these appeals statutes worked? According to Rutgers University's Center for Urban Policy Research (CUPR), under the Massachusetts program, there were 458 comprehensive permit applications for affordable housing filed under the comprehensive permit program between 1969 and 1986. These represented a proposed 33,884 housing units. CUPR, in 1994, placed its "guesstimate" of some 20,000 housing units completed and occupied under the statute since its inception.[192] In Connecticut, the appeals process, in effect since 1989, has led to the local approval statewide of some 250 to 500 affordable housing units by the end of 1993.[193] The Rhode Island statute was enacted in 1991. Its governing regulations were released a year later. From 1992 to 1993, there were only three appeals to the Housing Appeals Board (HAB), one of which was not properly filed and therefore could not be officially be heard by the state, a second that upheld a local community's denial, and a third where the HAB remanded the application to the local zoning board for further review on the issue of traffic safety. As of 1994, there had been no units built under the program.[194]

build low-and moderate-income housing that would assist town in achieving its plan to have at least 10 percent of its housing inventory consist of low- and moderate-income units in accordance with the state's Low and Moderate Housing Act was fully justified).

[191]R.I. Gen. Laws, Ch. 53, §45-53-6(b)(2) (1991).

[192]Burchell, Listokin, and Pashman, *Regional Housing Opportunities*, 129.

[193]Id., 133.

[194]Id., 136-137.